

**TREATING PEOPLE FAIRLY:
A SOCIO-LEGAL APPROACH TO ADMINISTRATIVE JUSTICE**

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I declare that I am the sole author of the original material (Chapters 1-2) and of the entire portfolio of published work (Chapters 3-10) which constitutes this thesis, and that six of these eight published papers have appeared in refereed books or journals.

Signed

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Please note that the portfolio of published work is presented in the same format as the original material. Because the eight papers were published separately, there is inevitably some repetition.

ABSTRACT

This thesis consists of a critical review of a portfolio of eight journal articles and book chapters on normative aspects of decision making in education and social security (Chapter 1); an overview of the most important research on procedural fairness and administrative justice that I have undertaken (Chapter 2); and the portfolio of papers referred to above (Chapters 3-10). Chapter 2 develops a socio-legal approach to procedural fairness, which sees it in terms of the 'trade-offs' that are made between a number of competing conceptions of administrative justice, and illustrates its power by outlining empirical research on the computerisation of social security in the UK, discretionary decision-making in Scottish prisons, the assessment of special educational needs in Scotland and England, and the aims and consequences of computerisation of social security in 13 OECD countries.

Chapters 3-5 are concerned with education and are based on a programme of research on the socio-legal and policy implications of parental choice legislation in Scotland which concluded that it had not produced an optimal balance between the rights of parents to choose schools for their own children and the duties of education authorities to promote the education of all children of school age. Chapter 3 outlines an alternative approach which takes choice seriously but avoids some of the adverse consequences of the existing legislation. Chapter 4 puts forward a set of institutional changes which would, it is argued, produce a better balance between the legitimate concerns of all the interested parties by involving teachers in the process of deciding which school would best facilitate a given child's learning and thus promote that child's interests. Chapter 5 provides some critical reflections on the programme of research, reviews subsequent policy developments, and considers how further research could respond to them.

Chapters 6-10 are concerned with social security. Chapter 6 gives a critical account of Titmuss' analysis of the relationship between rights and discretion in social security; develops an alternative approach; and suggests that the problem which needs to be

solved is one of achieving a balance between rules, discretion and rights. This approach is applied to analysing the shifting balance between these three principles in the social security system since the publication of Titmuss' article in 1971, and to criticising proposals for reforming the system of adjudication set out in a recently-published consultation paper. Chapter 7 examines these proposals against the background of the 'Change Programme', which aimed to cut the Department of Social Security's administrative costs by 25 per cent over a three-year period. Chapter 8 contrasts the Labour Government's decision to end the long tradition of lay membership of appeal tribunals in social security with the previous Conservative Government's proposals to remove the requirement that all appeal tribunals should have legally-qualified chairmen, and considers the wider implications of this change. Chapter 9 examines the relationship between substantive justice and procedural fairness in social security; reviews empirical evidence relating to changes in substantive justice and procedural fairness since 1979; and concludes that reductions in the level of social security benefits relative to average incomes and in the extent of procedural protection afforded to those who depend on social security weakened their rights as citizens. The final chapter, Chapter 10, contrasts Ferge's analysis of different normative models of social protection schemes with my analysis of the different normative models of how they should be run. It concludes that her preference for 'messy contracts' based on a plurality of principles has much in common with my preference for administrative procedures that attempt to achieve a balance between several models of administrative justice.

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CHAPTER 1

A CRITICAL REVIEW OF THE WORK SUBMITTED

HOW THE WORK WAS SELECTED

Two principles have guided the selection of work included in this thesis. The first principle is that the publications had to form ‘a coherent body of work’.¹ My main concern for many years has been with two related issues – procedural fairness and administrative justice – and, in a series of research projects, I have attempted to study the justice inherent in routine administrative decision-making in a number of different settings. In light of this, I have written a paper in which I have attempted to locate my work and outline the ways in which it has developed. That paper appears as Chapter 2 and should be read in conjunction with this chapter because they both seek to identify ‘the aims, objectives, methodology, results and conclusions’² of the research on procedural fairness and administrative justice that I have undertaken. In addition, I have reproduced a selection of my publications that are concerned with the normative aspects of administrative decision-making. My publications on this subject have covered aspects of education (in particular, parental choice of school and the assessment of special educational needs), social security (mainly on decision-making and appeals) and penal policy (almost exclusively on prisons). However, because my publications on imprisonment are largely derivative on one of the studies outlined in Chapter 2,³ they have not been included in this portfolio. The publications that have been included, and are reproduced as Chapters 3-10, cover two policy areas: parental choice in education and decision-making and appeals in social security.

The second principle is that I had to be the sole author of the work. This could have created a problem because my most important and original publications have all been jointly authored. Because empirical research is expensive in terms of time and resources, I have been very dependent on external funding.⁴ The grants I have obtained have made it possible to employ researchers to work with me and, over the years, I have been extremely fortunate to have worked with some outstanding

colleagues.⁵ Although I have set the research agenda, in that the proposals have reflected my interests and concerns, prepared the grant applications, and been responsible for the end-of-grant reports that were submitted to the funding bodies, my colleagues have made invaluable contributions to the development and the successful accomplishment of the research, to the interpretation of research findings, and to the resulting publications. This is why their names appear on all (or nearly all) the publications that arose from these projects.

To the extent that it is my work that is being assessed here, because it is sometimes very difficult to distinguish my contributions to jointly-authored publications from those of my collaborators, I decided not to include any of them.⁶ However, the paper reproduced as Chapter 2 does describe the research on which those publications were based in some detail.

PROCEDURAL FAIRNESS AND ADMINISTRATIVE JUSTICE

The first broad aim of Chapter 2 is to demonstrate that procedural fairness is an important component of overall justice and that what lies at the heart of justice, namely that ‘everyone should receive what is due to them’, applies just as much to procedures as to outcomes. In support of this claim, reference is made to research, which shows that people attach importance to procedural fairness whether or not the procedures work to their advantage and independently of their assessment of the justice of the outcome. The second broad aim is to apply this distinction to administrative justice and to demonstrate the need for procedures that are put into place internally in addition to external forms of accountability. This involves outlining and developing an approach to administrative justice, which sees it in terms of the ‘trade-offs’ between a number of competing conceptions of procedural fairness. This approach has informed a number of the empirical studies I have undertaken and the third broad aim of the chapter is to illustrate its power by outlining four studies that have examined the fairness of administrative procedures.

The chapter is in five parts. Part 1 is philosophical. After analysing the concept of justice and some of its subdivisions, it explores the relationship between procedural fairness and substantive justice. It analyses a number of different approaches and concludes that, although procedural fairness can contribute to substantive justice, it is not best understood in an entirely instrumental way because it can be justified independently. Justice applies to process, i.e. to the way in which people are treated, just as much as it applies to outcomes, i.e. to what they end up with. Part 2 is psychological. It reviews some early research, which showed that perceptions of procedural fairness exercise an independent effect on responses to favourable and unfavourable outcomes and on perceptions of distributive justice, and some more recent empirical research, which uses a more sophisticated categorisation of procedural fairness and demonstrates that the early findings are not specific to courtroom settings and can be generalised to other encounters with the legal system. It concludes by attempting to rebut claims that these conclusions are invalid because the theoretical framework which informs the research on which they are based assumes what it purports to demonstrate, namely that procedures have their own normative foundation and that people assess fairness primarily on that basis. Part 3 is institutional. It outlines and contrasts internal and external approaches to the achievement of procedural fairness. Although external approaches are well-established, it concludes that internal approaches are equally, if not more, important because they focus on the myriad of first-instance decisions rather than the much smaller number of decisions that are the subject of an appeal or complaint, and because they deal with first-instance decisions directly rather than at one remove. An analytic framework which embraces internal as well as external mechanisms for achieving procedural fairness and analyses administrative justice in terms of 'trade-offs' between a number of competing conceptions of procedural fairness, is outlined and developed. Part 4 is empirical and refers to four studies that have been informed by this analytic framework. It outlines research on the impact of computerisation on social security in the UK, on decision-making in the Scottish prison system, on the assessment of special educational needs in England and Scotland, and on the computerisation of social security in 12 countries. Part 5 is classificatory. It distinguishes four key modes of legal scholarship, law in action, doctrinal or 'black-

letter' law, legal, political and social philosophy, and socio-legal studies, and attempts to demonstrate that the approach advocated in the chapter exemplifies the socio-legal paradigm.

PUBLICATIONS ON EDUCATION

The papers reproduced as Chapter 3-5 derive from an ESRC-funded programme of research on the socio-legal and policy implications of parental choice legislation in Scotland.⁷ The project itself was in five parts and covered the events that led up to parental choice legislation in England and Wales as well as Scotland in the early 1980s; the implementation of the Scottish legislation by three Scottish local authorities; a survey of parents that was designed to ascertain their responses to the legislation and whether, and how, they took advantage of it; detailed studies of case level decision making and the operation of the appeals machinery; and finally a study of the impact of the legislation on admissions to primary and secondary schools. The research was written up as a book⁸ and the main findings are summarised in each of the three papers. The first of these papers (reproduced as Chapter 3) is a Briefing prepared for and published by the National Commission on Education.⁹ Arguing that the Scottish legislation had not produced an optimal balance between the rights of parents to choose schools for their children and the duties of education authorities to promote the education of all children for whom they were responsible, the main concern of this paper was to outline an alternative approach to parental choice which takes choice seriously but seeks to avoid some of the more unacceptable consequences of recent legislation. This paper drew quite extensively on the second paper (reproduced as Chapter 4), in which the alternative approach was set out at greater length and defended against criticisms that had been levelled at it.¹⁰ Of particular importance to the arguments put forward in Part 3 of Chapter 2 are the proposals to involve teachers as well as parents in selecting schools for children. The third paper (reproduced as Chapter 5) provides some critical reflections on the programme of research, reviews subsequent policy developments, and considers how research could best respond to this.¹¹

The provisions of the Education (Scotland) Act 1981 were in many ways similar to those of the Education Act 1980. Thus, in Scotland as in England and Wales, parents were given the right to request that their children be admitted to a particular school; education authorities were expected to comply with parental requests unless a statutory exception to this general duty applied; dissatisfied parents were given the right of appeal to a specially-constituted educational appeal committee and, if the latter found in favour of the parents, its decision was to be binding on the authority; and education authorities were required to provide parents with information about their allocation procedure and the criteria for admitting children to over-subscribed schools, about the school to which their child had been allocated and about any other school on request. However, there were also some important differences between the two pieces of legislation.

In three respects, the Scottish legislation gave parents stronger rights, and restricted the powers of authorities more than its English counterpart.¹² First, while the statutory exceptions to the authorities' duty to comply were broad and general in England, they were much more specific in Scotland. In England, the primary exception, which applied when compliance with parents' requests would 'prejudice the provision of efficient education or the efficient use of resources',¹³ enabled an authority to justify a refusal by referring to conditions in schools other than the one requested by the parents or to conditions in their schools generally. By contrast, in Scotland, where the primary exceptions applied when compliance would entail either the employment by the authority of an additional teacher, or significant extensions or alterations to the school, or 'be likely to be seriously detrimental to the order and discipline at the school or the educational well-being of the pupils there',¹⁴ the authority could only refer to conditions at the school requested by the parents. Second, whereas parents in Scotland could appeal against an adverse decision of an appeal committee to the sheriff,¹⁵ parents in England had no further right of appeal. This is particularly important, not only because it gave parents a second chance to appeal but also because it requires the authority to convince a judge that it has grounds to refuse the parent's request. Third, where an appeal is upheld in Scotland, the authority is required to review the cases of all parents in similar circumstances

who have not appealed and, if the decisions are unchanged, it has to grant the parents a further right of appeal.¹⁶ There is no comparable provision in the English legislation. However, in one other respect, not referred to in any of the papers, the English legislation gave parents stronger rights than they were given in Scotland. While the English legislation gave parents the right to state their reasons for requesting a particular school¹⁷, the Scottish legislation made no reference to the giving of reasons. As explained below, this difference is of considerable significance.

In the book we wrote, we distinguished an authority-wide from a child-centred approach to school admissions.¹⁸ Under the *authority-wide approach*, the main concern of the authority is to pursue its policy goals and the circumstances of an individual child are relatively unimportant. These may involve trying to ensure that each school contains a sufficient number of pupils to deliver the curriculum, that no school should contain so many pupils that its facilities and/or teaching staff are overburdened, and that the number and distribution of the pupils is commensurate with the efficient organisation of the school. In addition, many authorities have adopted neighbourhood school policies that seek to promote links between schools and the communities they serve and give priority in school admission to children who live in the school's catchment area, while some authorities try to ensure that each school contains a reasonably balanced academic and social pupil mix.

In contrast, the main concern in a *child centred-approach* is with the matching of individual children to particular schools, while the pursuit of collective policy goals is correspondingly less important. This matching of individual children to particular schools can be achieved in one of two ways. In selective school systems, experts assess the child's ability and aptitude and then match the child to the school that can offer the most appropriate course of education. Alternatively, in non-selective school systems, parents can be given the opportunity for deciding which school their child should attend. Both approaches assume that schools are different in significant ways and that one school may be more suitable for a given child than another.¹⁹ They

differ in terms of who (an expert or the parent of the child) is best placed to identify the child's needs.

Each of the two approaches to school admissions described above reflects a more general orientation to policy implementation. Thus, the authority-wide approach reflects a *collective-welfare orientation* (which focuses on the achievement of collective ends, is primarily concerned with the overall pattern of decision-making, develops rules and procedures to achieve the programme's ends, and recognises the necessity for trade-offs between the various ends the policy is trying to achieve) while the child-centred approach reflects an *individual-client orientation* (which focuses on each individual case, respects individual autonomy and assumes that individuals are capable of deciding and acting for themselves, allows individuals to challenge unfavourable decisions and precludes the possibility of trade-offs).

The two approaches to school admissions (and likewise the two general orientations to policy implementation) are ideal types and, as such, are not exemplified by any one authority. However, because they are always present to some degree, they help to explain the nature of decision-making in all authorities. They can, in fact, be mapped on to the first three models of administrative justice outlined in Part 3 of Chapter 2 above. Thus, the authority-wide approach to school admissions (which enables education authorities to prevent overcrowding and under-enrolment, deploy resources in an efficient manner and pursue their own conception of social justice) maps onto the bureaucratic model, the first variant of the child-centred approach (in which professional assessments of ability and aptitude are all-important) maps onto the professional model, while the second variant of the child-centred approach (in which parents decide what is best for their children and priority is given to their concerns) maps onto the legal model. Under the selective system of secondary school admissions that was in the ascendancy until the mid 1960s, the bureaucratic and professional models were in the ascendancy and the legal model was not much in evidence. Following the reorganisation of secondary education along comprehensive lines, the importance of the professional model declined while that of the legal model

gained in importance. However, the influence of the bureaucratic model remained strong.

The research demonstrated that, in all three authorities, the administration of school admissions was not greatly affected by the 1981 Act. Each of them continued to use the procedures for admissions that they had used before the legislation took effect. Parents were notified of their child's allocation to their 'district school' and given an opportunity to request a non-district school. Most parents accepted the allocation to their 'district school'²⁰ and, for those parents who requested a place at a non-district school, most of their requests were granted.

The two changes introduced by the 1981 Act involved the standards used by authorities to decide parents' placing requests and the availability of appeals to the appeal committee and the sheriff. As a result of the legislation, the circumstances in which authorities could refuse requests were very limited. This produced a substantial decrease in the number of refusals in one authority and stimulated the number of request made by parents in all three authorities. Thus, the 1981 Act clearly strengthened the ability of parents to obtain a place for their child at a non-district school. As a result of the legislation, they could also challenge a decision by the authority to refuse their request. However, because the authorities granted most requests and because the appeal committees were generally supportive of the authorities' generally very limited attempts to impose admission limits on over-subscribed schools, appeal committees did not play a significant role in school admissions. Appeals to the sheriff played an even more limited role because they tended to be supportive of the authority and, where this was not the case, e.g. in some other authorities, the authority would routinely concede the case before the hearing began.²¹ However, it is likely that the existence of the right of appeal to an appeal committee and, from there, to the sheriff has discouraged authorities from construing the statutory grounds of refusal too broadly or ignoring parents rights in determining school admissions.

The evidence from our research suggests that appeal committees did not require authorities to justify their admission limits in response to challenges by parents and either assumed that the limit was justified or that a few extra children could be admitted in excess of that limit. Sheriffs, on the other hand, usually ignored the authorities' arguments for admission limits and instead required them to show how the admission of one more child would cause serious detriment to education at the school concerned.²² Thus, neither appeal committees nor sheriffs provided an effective review of the authority's decision to impose an admission limit. The evidence from our research also suggests that appeal committees were very poor at balancing the concerns of individual parents against those of the authority. This was, in part, due to the fact that, unlike the English legislation, the Scottish legislation did not give parents the right to state their reasons and, in these circumstances, authorities formulated policies for admitting children to over-subscribed schools in terms of 'objective' criteria, e.g. having a sibling at the school in question or the distance from home to school. Authorities believed that objective criteria were less open to manipulation and that they were fairer than subjective criteria because the latter inevitably put some parents at an advantage over others. However, one consequence of this was that the process of allocating children to schools took very little account of individual circumstances. Thus, in spite of granting rights of school choice to parents, the legal model of administrative justice was little in evidence and the bureaucratic model remained very dominant. This was very frustrating for those parents who wished their child to attend an over-subscribed school because they liked some aspect of the school or thought that their child would do better there since the admissions and appeals procedures took little account of such considerations.

The papers reproduced as Chapters 4 and 5 outline an attempt to achieve a better balance between the interests of those concerned. One way of doing so would be to tilt the balance in favour of parents by strengthening their rights, e.g. to state their reasons and have these taken into account. However, our research indicated that, in choosing schools for their children, parents were influenced more by geographical and social factors, i.e. by the location of the school and the social backgrounds of the pupils at the school, than by educational considerations, e.g. by the curriculum,

teaching methods or (even) examination results, and that they relied on rather limited and second-hand information about the reputations of the schools concerned. Thus, simply strengthening parents' rights could lead to increased social segregation and, in this and other ways, could well be contrary to public policy.

An alternative approach starts from the premise that more thought needs to be given to the interests that the right of school choice is trying to protect. At present, the legislation seeks only to protect parents' interests in choice. However, because parents act as agents of their children but are not all equally effective in this regard, it is important to consider children's interests directly. As schools already differ in many ways, and would differ even more if the proposals set out below (and more fully in Chapters 3 and 4) were enacted, this would entail efforts to ensure that children attend those schools that are best suited to their particular personalities and talents. Teachers and parents will often have different views as to what these are: it is therefore important to find some means of involving them both in decision-making. If all schools were required to produce genuinely informative prospectuses; if parents and pupils were encouraged to visit all the schools concerned (rather than discouraged as is often the case at present); and if discussions were to take place between teachers, parents and, in the case of older pupils, the pupils themselves, this would enable teachers, parents and pupils to examine each other's reasoning, to decide what the child's interests were and how they could best be furthered.

The four main components of an alternative approach to education policy which takes choice seriously but seeks to achieve a better balance between the interests of education authorities, teachers, parents and pupils are as follows:

- Over and above the common core curriculum, schools would be encouraged to develop particular curricular strengths, for example in music, the arts, sports, modern languages or technology, and to advance their own particular teaching styles, institutional ethos and extra-curricular activities. Although schools already differ in all these respects, they would be encouraged to be more explicit about these differences than they are at present.

- In order to ensure the widest possible access to a range of schools with different characteristics, all barriers to school admissions, in particular school catchment areas, would be abandoned. No child would be allocated to a school simply on the basis of where they lived and active consideration would be given to identifying the most appropriate school for every child, not just for a minority of children as is currently the case.
- Decisions about school allocation should seek to promote children's interests (rather than parental preferences) and would involve teachers and older pupils as well as parents. Where the number of applicants for a school is greater than the number of available places, priority would be given to those whose cases are most strongly supported.
- Local authorities would be expected to formulate admissions policies for schools. These would include admission limits on 'popular' schools, which would provide a measure of protection for 'vulnerable' schools that would otherwise experience difficulty in delivering the curriculum.

The approach outlined above has some features in common but differs in a number of important ways from the proposals for school reform in England that have recently been outlined by the government.²³ Under these proposals, 50 per cent of English secondary schools would become specialist schools and would be able to select up to 10 per cent of their pupils according to aptitude. They have aroused a great deal of criticism²⁴ on the grounds that they would be very divisive – the specialist schools would qualify for extra funding and would undoubtedly be regarded as superior in status – and because the allocation procedures would be very unfair – since most pupils would be admitted to a specialist schools on the basis of residence or parental choice while other pupils, who might benefit more from such a school, might not be admitted or might not apply.

The proposals outlined here would suffer from neither of these defects. In addition, they would ensure a better balance between the bureaucratic, professional and legal

models of administrative justice, and between the different interests of education authorities, teachers, parents and pupils. Education authorities would be responsible for ensuring an appropriate degree of diversity among their schools, for setting intake limits on some schools to ensure that intakes to all schools were viable, and for formulating policies relating to the gender, class or ethnic composition of schools. Attention would be given to the needs and circumstances of every child. However, parents would no longer be the sole arbiters of their children's interests and teachers would, once again, have a role to play in this assessment. This is very important and would go some way towards ensuring that children's interests are safeguarded. If parents and teachers are unable to agree on what school would be best for the child, the parent's view might still prevail although, in the event of the school being over-subscribed, less weight would be attached to it.

The paper reproduced as Chapter 5 was published in 1997, 10 years after programme of research on parental choice was completed. It subjects this research to some criticisms – in particular for its parochialism and its failure to adopt a comparative perspective – and then reviews policy developments in Scotland and England since that time, describes the then current policy agenda and indicates how further research might respond to this. It concludes that the key policy issue to which research should now be addressed is the relationship between choice and diversity and argues that this should be studied comparatively across a number of different educational systems through research which seeks to investigate the implications of each for the other and for other societal values. The change of government in May 1997 did not lead to any major reversals in education policy in England but devolution has resulted in a growing divergence between education policies north and south of the border. In light of this, the conclusions in this paper still stand.

PUBLICATIONS ON SOCIAL SECURITY

The origins of many of the papers that are reproduced as Chapters 6-10 can be traced back to the Richard Titmuss Memorial Lecture, which I delivered at the Hebrew University in Jerusalem in November 1996.²⁵ The first of these papers (reproduced

as Chapter 6) is based on that lecture.²⁶ It gives an account of Richard Titmuss' attempt to analyse the relationship between rights and discretion in social security in a celebrated and controversial paper published in 1971.²⁷ It then develops an alternative approach, which distinguishes bureaucratic rules from claimants' rights and suggests that the problem that needs to be solved is one of achieving a balance between rules, discretion and rights. This balance reflects the view, outlined in Part 3 of Chapter 2, that the achievement of administrative justice involves finding a proper balance between normative conceptions of decision making based on bureaucracy (in the case of rules), professionalism (in the case of discretion) and legality (in the case of rights). This approach is then used to examine the shifting balance between these three principles in the social security system over the 25-year period since the publication of Titmuss' article, and to criticise proposals to reform the system of adjudication which the Government had set out in a recently-published consultation paper.²⁸ These proposals would, *inter alia*, have strengthened bureaucratic control over first-tier decision-makers and restricted claimants' rights of appeal to a tribunal.

This paper is followed by two shorter ones. The second paper (reproduced as Chapter 7)²⁹ examines the Government's proposals against the background of the Department of Social Security's 'Change Programme', which aimed to cut administrative costs by 25 per cent over a three-year period. It concludes that, since the government's own estimate of the savings resulting from the implementation of its proposals was a paltry £50 million per annum 'over the longer period' and since this would have been a small price to pay for maintaining the existing levels of procedural protection enjoyed by recipients of social security, which were one of the few compensations for the steady decline in benefit levels, the measures proposed could neither be explained nor justified in terms of their contribution to administrative savings. The third paper (reproduced as Chapter 8)³⁰ seeks to explain the Labour Government's decision to end the long tradition of lay membership of appeal tribunals in social security.³¹ This was an entirely different outcome to the one envisaged by the previous (Conservative) Government, which had proposed to

remove the legally qualified chairmen,³² and the paper seeks both to explain how this policy U-turn came about and to consider the wider implications of this change.

The fourth paper (reproduced as Chapter 9)³³ examines the relationship between substantive justice and procedural fairness in social security. After considering whether this is a theoretical or an empirical issue, and concluding that it is an empirical matter, it analyses developments in the UK social security system since 1979.³⁴ It reviews empirical evidence relating to developments in substantive justice, focusing on changes in the extent of poverty and in patterns of inequality over the period, and concludes that there was a fairly consistent trend towards increased poverty and greater inequality between 1979 and 1992.³⁵ It then provides a critical assessment of developments in procedural fairness over the same period. It focuses on the 1980 reforms (under which the model of adjudication that had formerly been used in national insurance and related benefits was extended to cover supplementary benefit, and a single system of adjudication applied across the board); the 1986 reforms (under which supplementary benefit was replaced by a simplified income support scheme and a cash-limited, discretionary social fund with its own pattern of adjudication, and a dual system of adjudication re-emerged); and the recent reforms to the system of adjudication outlined above. Finally, it explores the implications of these changes in substantive justice and procedural fairness for the citizenship of those who depend on social security. It concludes that reductions in the level of social security benefits relative to average incomes and in the extent of procedural protection afforded to those who were dependent on social security had doubly disadvantaged them. The former not only weakened their social rights but also had a knock-on effect on their civil and political rights, making it considerably harder for them to participate in the life of society as full citizens; while the latter not only curtailed their civil rights still further but also had a knock-on effect on their social rights, making them less secure than they would previously have been.

Although Chapter 9 examines the relationship between substantive justice and procedural fairness in social security, it does not employ a discourse matrix analogous to the one that Brian Longhurst and I developed in our study of day-to-day

administrative decision-making in the Scottish prison system (this is outlined in Parts 3 and 4 of Chapter 2 below). This discourse matrix combined the discourses of substantive justice (or ‘ends discourses’) with the discourses of procedural fairness (or ‘means discourses’) that existed in the Scottish prison system at the time. Applying this approach to social security, I noted in my Inaugural Lecture³⁶ that the dominant conceptions of substantive justice in social security, were associated with employment, social insurance and social assistance – the first being exemplified in various ‘welfare to work measures’, the second with contributory benefits and the third with means-tested benefits paid for out of taxation – and that the dominant conceptions of procedural fairness were associated with bureaucracy, professionalism and legality.³⁷ I argued that each of these conceptions was associated with a distinctive form of discourse and that the two sets of discourses could be combined. I also noted that the individuals, groups and institutions associated with each of the cells in the matrix (numbered 1-9 in Table 1 below) could, in principle, be identified. Unfortunately, I had not carried out any systematic research and was not in a position to do this.

Table 1: Discourse Matrix for Social Security

	Employment	Social Insurance	Social Assistance
Bureaucracy	1	2	3
Professionalism	4	5	6
Legality	7	8	9

However, by relying on material in the public domain, I was able to associate rows and columns in the matrix with key players. In the case of substantive justice, which embraces the broad aims of social security, I noted that a tremendous power struggle was taking place between Frank Field and Gordon Brown. Frank Field had been appointed Minister of State for Welfare Reform after the 1997 General Election and given general responsibility for outlining a radical reform of the social security system. His enthusiasm for social insurance, on the grounds that it encourages savings and thrift, and his opposition to means testing were both well known. On the other hand, Gordon Brown, Labour’s powerful Chancellor of the Exchequer, was not only the driving force behind ‘welfare to work measures’ but was also committed to

system. His enthusiasm for social insurance, on the grounds that it encourages savings and thrift, and his opposition to means testing were both well known. On the other hand, Gordon Brown, Labour's powerful Chancellor of the Exchequer, was not only the driving force behind 'welfare to work measures' but was also committed to 'targeting' resources on those with greatest needs. This did not make him into an enthusiast for means testing in the same way as his Conservative predecessor (Peter Lilley) – he has, for example, introduced a series of tax credits to provide in-work benefits to those in employment – although he is not as implacably opposed to means-tests as Frank Field.³⁸

When Frank Field's Green Paper³⁹ was published in March 1998, it was generally regarded as a disappointment. In 'thinking the unthinkable', he does not appear to have been able to secure the support of other powerful interests, not least Gordon Brown and the Treasury. A few months later, Frank Field resigned. According to Will Hutton,⁴⁰ the power struggle between Frank Field and Gordon Brown involved a clash between two alternative visions for the future of social security, between 'a social democratic model', based on universal benefits and social insurance, with a government committed to managing the economy to ensure that there is work for everyone and people able to do it, and 'a neo-conservative model', based on means-tested benefits, paid out of general tax revenues, and a government committed to low levels of taxation. Although this characterisation is correct up to a point, it ignores Gordon Brown's (and the Government's) primary and over-riding commitment to employment as the best means of providing social security, at least for those who are capable of work. However, the important points to note are that this power struggle was decisively won by Gordon Brown and that his vision of social security has come to be the dominant one. He even managed to ensure that Harriet Harman's successor as Secretary of State⁴¹ was none other than his own Chief Secretary to the Treasury, Alistair Darling.

In the case of procedural fairness, which deals with how social security should be administered, I identified the powerful supporters of the three normative models of decision making that were in play: the Benefits Agency supported bureaucracy, the

supported professionalism and became an increasingly important 'player' as Welfare to Work programmes were developed. Any conflict that might have been expected to emerge between these various institutional actors was muted, first, by introducing greater controls over the Independent Tribunal Service (which was renamed the Appeals Service) and abolishing the Central Adjudication Service; and, second, by joining the Employment Service, which ran Jobcentres, with those parts of the Benefits Agency that dealt with people of working age, in a new organisation known as 'Jobcentre Plus', which is accountable to Alistair Darling (who became Secretary of State for Work and Pensions) in the second Labour Government. In a development which is highly reminiscent of earlier developments in the Scottish Prison Service, the fusion of professionalism (in this case associated with the former Employment Service) and bureaucracy (in this case associated with the old Benefits Agency) is likely to strengthen a new form of managerialism which will be associated with 'Jobcentre Plus'. The combination of a dominant form of substantive justice (work for those who can, increasingly means-tested benefits for the rest) with a dominant form of procedural fairness (managerialism) reflects the surprising (and no doubt temporary) absence of serious debate about the future of social security in the four years since Frank Field's resignation in 1998.

The analysis that has been sketched here is not intended as a definitive exploration of recent developments in social security policy but is, rather, intended to illustrate the ways in which the approach to analysing procedural fairness and substantive justice which is outlined in Chapter 2 can be applied to analysing the development of policy.

The final paper (reproduced as Chapter 10)⁴² was written for a conference to mark the 70th birthday of a very distinguished Hungarian sociologist of social policy, Professor Zsuzsa Ferge, and seeks to make a connection between her analysis of different normative models of what social protection schemes aim to achieve and my analysis of the different normative models of how they should be run. In a recent paper,⁴³ Zsuzsa Ferge distinguishes between four patterns of access to resources – charity, reciprocity, redistribution and the market. In each case, she describes the relationship between the giver and the receiver, and then compares different forms of

social protection in terms of these principles. She argues that ‘messy contracts’ based on a plurality of principles, are always preferable to ‘pure contracts’ based on a single principle because ‘they can serve complex social purposes’ and ‘incorporate opposed interests’. On these grounds, she extols the virtues of social insurance in general and public, earnings-related, pay-as-you-go schemes in particular and asserts their superiority over forms of social protection based on a single principle, e.g. social assistance (based on charity), mutual aid (based on reciprocity) and private insurance (based on market principles). This approach has much in common with my analysis of competing, normative models of administrative justice and the trade-offs that are made between them; and my preference for administrative procedures which attempt to achieve a balance between a plurality of these models and the principles they embody, rather than those which reflect a single, dominant model, with the result that the principles which are associated with it are not effectively challenged by any others.

AN OVERALL ASSESSMENT

It is my contention that the body of work, which is summarised in Part 4 of Chapter 2 and reproduced in Chapters 3-10, constitutes ‘a coherent body of work [which] contributes significantly to the expansion of knowledge’.⁴⁴ Although my research has focused on a small number of policy areas, the approach it has sought to develop and the understanding of behaviour it reflects are both of wide general application. Central to this approach has been the idea that there are a number of competing conceptions of procedural fairness and that each of them is associated with a different model of administrative justice. The characteristics of procedural fairness encountered in a given context reflect ‘trade-offs’ that are made between individuals and groups who seek to promote these different models of administrative justice. Since each of these models is indeed ‘coherent and attractive’, it follows that, other things being equal, the procedural fairness which results from balancing a plurality of models of administrative justice is usually preferable to that which results from one dominant model of administrative justice which is not effectively challenged by any others.

I have attempted in my research to develop and apply a socio-legal approach to the analysis of procedural fairness and administrative justice. This means that, in contrast to more conventional legal approaches, it has employed concepts and categories derived from the social sciences; it has focused on routine, first-instance decision-makers rather than on the leading cases that are decided by courts and tribunals; and has been informed by philosophical analysis. It has utilised theoretically-informed empirical research to address a range of normative as well as positive questions. Thus, it has not only attempted to explain why administrative justice is as it is but also how it could be different. It has tried to integrate an understanding of structure with an understanding of agency by adopting (and developing) a model of behaviour in which individuals and groups are seen to further their particular conceptions of the principles that guide their behaviour. The struggle for control between these individuals and groups does not take place in a vacuum but is constrained by a set of contextual factors which structure power relations and shape the outcome of power struggles. It has, in my view, thrown light on a set of problems that are concerned with what it means for the organisations of the welfare state to treat people fairly, which have not hitherto been given the attention they deserve. However, how successful it has been is, ultimately, for others to judge.

NOTES AND REFERENCES

1. This is required by Regulation 3.11.14.
2. *Ibid.*
3. Based on Adler, M. and Longhurst, B. (1994), *Discourse, Power and Justice: Towards a New Sociology of Imprisonment*, London: Routledge.
4. I would like to record my thanks to the bodies who have funded this research, in particular to the ESRC from whom I have received a number of substantial grants, but also to the Department of Social Security and IBM (UK) Ltd.
5. In the context of this thesis, I would like to acknowledge my considerable indebtedness to Roy Sainsbury, Brian Longhurst, Enid Mordaunt and Paul Henman.
6. According to Regulation 3.11.13 for the degree of PhD (by Research Publications), it is actually sufficient for candidates to 'be able to demonstrate in the critical review of the submitted work that they have made a major contribution to all of the work that has been produced by more than one author'.
7. Grant No. E00360023. This research was conducted jointly with two Research Fellows, Alison Petch and Jack Tweedie.
8. Adler, M., Petch, A. and Tweedie, J. (1989) *Parental Choice and Educational Policy*, Edinburgh: Edinburgh University Press.
9. Adler, M. (1993a) *An Alternative Approach to Parental Choice* (NCE Briefing No. 13), London: National Commission on Education, reprinted in *Briefings for the National Commission on Education*, London: Heinemann, pp. 183-198.
10. Adler, M. (1993b) 'Parental Choice and the Enhancement of Children's Interests' in P. Munn (ed.) *Parents and Schools: Customers, Managers or Partners?*, London: Routledge, pp. 47-64.
11. Adler, M. (1997a) 'Looking Backwards to the Future: Parental Choice and Educational Policy', *British Journal of Educational Research*, 23(3), pp. 297-313.
12. The reasons for this are explained in Chapter 2 of Adler, Petch and Tweedie (1989), *op. cit.*
13. Education Act 1980, s.6(3).
14. Education (Scotland) Act 1981, s.28A(3)(a).
15. Education (Scotland) Act 1981, s.28F.
16. Education (Scotland) Act 1981, s.28E(5) and (6).
17. Education Act 1980, s.6(1).
18. Adler, Petch and Tweedie (1989), *op. cit.*, pp. 15-20.
19. In terms of educational differences, schools may differ in the courses that are available, in the emphasis they place on particular subjects, in the ways in which children are taught, in the facilities they provide for children with

special educational needs, and in the extra curricular activities they provide. They may also differ in the philosophies espoused by the headteacher and the staff, in their attitudes to religion, uniform and homework, in the disciplinary systems they employ, and in the extent to which parents are encouraged to take part in school activities. In addition, schools may differ in their outputs measured in terms of examination results, staying-on rates or in the proportion of school leavers who go into higher education or find employment. Finally, schools may differ in their effectiveness, i.e. in their ability to get the best out of their pupils. In addition to these educational differences, non-educational differences may also be important. Thus schools may differ in the social composition of their intakes – some may be single sex schools or denominational schools, others may have primarily middle class or primarily working class catchment areas, and schools vary in the proportion of their pupils with ethnic minority backgrounds. Schools also differ in their buildings and grounds – some may occupy purpose-built accommodation while others are on several sites, some may have adjacent playing fields while others have to share distant sports facilities. Finally schools will differ in their locations – some will be more convenient or safer to get to than others.

20. In every case, this was the school serving the catchment area in which the child lived.
21. Thereby ensuring that the case had no implications for other parents. See note 11 above.
22. The only exception came in a small number of decisions where the sheriff adopted a school-level approach.
23. Department for Education and Employment (2001) *Schools: Building on Success*, CM. 5050, London: HMSO.
24. See, for example, Woodward, W. (2001) 'Anger over Two-tier School Plan', *The Guardian*, 14 February.
25. Adler, M. (1996) 'Rights and Discretion in Social Security: Did Titmuss get the Balance Right?', *The Richard M. Titmuss Memorial Lecture*, Jerusalem: Paul Baerwald School of Social Work, The Hebrew University, also published as Adler, M. (1997b) 'Welfare Rights, Rules and Discretion: All for One or One for All?', *New Waverley Paper SP12*, Edinburgh: Department of Social Policy, University of Edinburgh.
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- SP14), Edinburgh: Department of Social Policy, University of Edinburgh, pp. 15-18.
30. Adler, M. (1999) 'Lay Tribunal Members and Administrative Justice', *Public Law*, Winter, pp. 616-625.
 31. It was brought to an abrupt end when Parliament assented (without debate) to the Social Security and Child Support (Decisions and Appeals) Regulations 1999.
 32. Under Part 1 of the Social Security Bill 1997, the Government had sought to abolish both the requirement that appeals relating to social security and child support had to be heard by a three-person tribunal and the requirement that tribunal chairmen had to be lawyers of standing. Opposition to the Bill in the House of Commons focused on other contentious provisions, most notably those affecting single parents under Part 2 of the Bill, and the proposals in Part 1 attracted little criticisms. However, they encountered considerable criticism in the House of Lords. In an effort to secure the passage of the Bill, the Government agreed to an amendment from Lord Archer of Sandwell, Chairman of the Council on Tribunals, which ensured that at least one member of an appeal tribunals (not necessarily the Chairman) would be legally qualified.
 33. Adler, M. (2001) 'Substantive Justice and Procedural Fairness in Social Security' in P. Robson and A. Kjørstad (eds.) *Poverty and the Law*, Oxford: Hart Publishing, pp. 121-147.
 34. Although the paper was published in 2001, it was written three years before that. It covers the period from 1979 to 1997/98.
 35. More recent work published by the Joseph Rowntree Foundation and the Institute of Fiscal Studies confirms these trends. See Rahman, M., Palmer, G. and Kenway, P. (2001) *Monitoring Poverty and Social Exclusion 2001*, York: Joseph Rowntree Foundation; and Goodman, A. (2001) 'What Happened to Income Inequality in the 1990s?', *IFS Update*, London: Institute of Fiscal Studies, Autumn.
 36. Adler, M. (1998b) 'Just Welfare', Inaugural Lecture in the (Personal) Chair of Socio-Legal Studies at the University of Edinburgh, 10th February.
 37. In the lecture, I did not consider any of the additional conceptions of procedural fairness (based on managerialism, consumerism or the market) which are described in Part 3 of Chapter 2 below.
 38. See Field, F. (1998) 'Means-testing will not benefit Society', *The Independent*, 10th August.
 39. Department of Social Security (1998) *New Ambitions for our Country: A New Contract for Welfare*, Cmd. 3805, London: HMSO.
 40. Hutton, W. (1998) 'Until Tony Blair decides whether he is a Liberal Conservative or a Social-democratic reformer, those snared in the welfare system will remain in limbo', *The Observer*, 2nd August.
 41. Harriet Harman was sacked when Frank Field resigned in July 1998.

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42. Adler, M. (2001) 'Messy Contracts or Trade-Offs between Competitive Principles?', paper presented at Special Conference of the Hungarian Social Policy Association, 20 March. This paper is to be published in a Festschrift for Professor Zsuzsa Ferge.
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 44. As required by Regulation 3.11.14.

PART I: THE CONCEPT OF JUSTICE

The Meaning of Justice

According to David Miller, 'the subject matter of justice is the manner in which benefits and burdens are distributed among persons' (1999: 11). In his book, *Justice and the Limits of Reason*, he argues that 'the basic idea of justice is that we should not treat people as mere means to our ends, but as ends in themselves' (1999: 11). This idea is central to the concept of justice, which is the subject of this book. The book is divided into two parts. The first part, 'The Concept of Justice', discusses the basic ideas of justice and the limits of reason. The second part, 'The Limits of Reason', discusses the limits of reason and the limits of justice. The book is written for a general audience and is intended to be a guide to the concept of justice.

CHAPTER 2

A SOCIO-LEGAL APPROACH TO PROCEDURAL FAIRNESS

INTRODUCTION

The aims of this chapter are, first, to demonstrate that procedural fairness is an important component of overall justice and that what lies at the heart of justice, namely that 'everyone should receive what is due to them', applies just as much to procedures as to outcomes. In support of this claim, reference is made to research, which shows that people attach importance to procedural fairness whether or not the procedures work to their advantage and independently of their assessment of the justice of the outcome. The second aim is to apply this distinction to administrative justice and to demonstrate the need for procedures that are put into place internally in addition to external forms of accountability. This involves outlining and developing an approach to procedural fairness, which sees it in terms of the 'trade-offs' between a number of competing conceptions of administrative justice. This approach has informed a number of empirical studies I have undertaken and the third aim of the chapter is to illustrate its power by outlining four studies that have examined the fairness of administrative procedures.

PART 1: THE CONCEPT OF JUSTICE

The Meaning of Justice

According to David Miller, 'the subject matter of justice is the manner in which benefits and burdens are distributed among men [and women] whose qualities can be investigated'¹ and 'the just state of affairs is one in which each individual has exactly those benefits and burdens which are due to him by virtue of his [or her] personal characteristics and circumstances'.² Although there is much argument about the scope of justice claims and the priority that should be given to them, justice is widely recognised as a principle of wide application and considerable importance. Some

scholars contend that it is all-important. John Rawls, in particular, asserts that it is the primary criterion by which the basic structure of society should be judged, 'the first virtue of social institutions, just as truth is of systems of thought'.³

Rawls distinguishes between the *concept* of justice, which refers to 'a proper balance between competing claims', and competing *conceptions* of justice, each of which expresses a different set of 'principles for identifying those considerations which determine this balance'.⁴ The coexistence of a single concept and several competing conceptions suggests that justice is, like many other important social and political ideals, *essentially contested*.⁵ As such, it can be defined in a fairly uncontroversial way (in this case as 'a proper balance between competing claims') but the terms in which it is defined (i.e. what constitutes 'a proper balance' and even what are to count as 'claims') are the subject of considerable disagreement. These disagreements are not random but are associated with differences in personality, gender, class, culture and ideology, and vary across time and space.

Legal Justice and Social Justice

It has become commonplace to distinguish between different subdivisions of justice in terms of their fields of application. Thus, Honoré points out that, while *restorative justice* is concerned with compensation for harm or injury (in civil matters), *punitive justice* is concerned with the punishment of wrongdoing (in criminal matters).⁶ Together they comprise *legal justice*, which is a major concern of the legal system, i.e. of litigation and the courts. *Social justice*, on the other hand, is concerned with the distribution of benefits and burdens among individuals and groups in society. As such, social justice is the subject matter of social, economic and fiscal policy, which are concerned with the distribution of 'primary goods' such as income, wealth, health and education. It is a major concern of government, in particular of those government departments that are responsible for taxation and programmes of public expenditure. Other institutions in civil society, such as private and non-profit organisations, are also concerned with social justice but are not dealt with here.

Two caveats need to be made at this point:

- Because punishments have been included in the domain of legal justice, the burdens which are included here refer to disadvantages other than punishments, e.g. to the taxes that are needed to finance the public provision of benefits and services.
- Although social justice usually refers to the allocation of material benefits and burdens, the 'primary goods' with which it is concerned also include intangible (non-material) resources, e.g. consideration and respect.

Although social justice can be distinguished from legal justice, some of the same moral considerations apply to them both. Likewise, although legal justice is obviously bound up with the legal system, it is important to recognise that this is also true of social justice – legal justice and social justice are merely concerned with different aspects or areas of law.

Procedural Fairness and Substantive Justice

A distinction can also be made between *procedural fairness*, which is synonymous with *procedural justice*, and is concerned with 'process', and *substantive justice*, which is concerned with 'outcomes'.⁷ Procedural fairness focuses on how individuals are treated while substantive justice focuses on what they end up with. Both the subdivisions referred to above, i.e. legal justice and social justice, have procedural and substantive dimensions. In the case of legal justice, procedural fairness includes the rules of evidence and procedure which govern proceedings in the criminal and civil courts, while substantive justice refers to the outcomes of criminal and civil actions; in the case of social justice, procedural fairness includes the administrative rules which govern decision making by government departments and other official bodies while substantive justice refers to allocation of benefits, the delivery of services, the award of licenses and so on.

It is, of course, possible to take issue with the distinction made above on the grounds

that treating people fairly should itself be regarded as an outcome of the decision-making process.⁸ However, if it is an outcome, it is clearly a different kind of outcome from those outcomes that the procedures are established to achieve. If the latter are referred to as *primary outcomes*, the former may be referred to as a *secondary outcome*. The primary outcome of criminal procedures in the courts is to determine guilt and court procedures can be judged by how effectively they do so, i.e. by the proportion of guilty people who are acquitted and the proportion of innocent people who are convicted. Likewise the primary outcome of administrative procedures is to regulate activities, impose obligations and confer entitlements, and they may likewise be judged by the proportion of false negatives and false positives they produce. Criminal courts and administrative agencies should both aim to treat people fairly but that is not their primary purpose. Thus, even if treating people fairly is regarded as an outcome, a distinction must be made between the justice of the outcomes that the procedures are intended to deliver and the fairness of the ways in which the procedures deal with people.

The idea of *procedural fairness* suggests that a concern with 'ensuring that everyone receives their due' can be applied to procedures and that a procedurally just state of affairs is one in which individuals are treated in a manner that reflects what is due to them in terms of their personal characteristics and circumstances.

There have been various attempts to specify the requirements of procedural fairness. Thus, in legal justice, reference is made to a fair trial (in the case of criminal prosecutions) and to fair proceedings (in civil matters). In a criminal prosecution, the procedural requirements reflect the rights and duties of the accused and the state. What these ought to be are matters of ongoing debate but there is wide agreement that accused persons should be entitled to know the case against them, to be legally represented, to plead not guilty and, if they do so, to be treated as innocent until proven guilty. The evidence against them must stand up and the case for the prosecution must be established 'beyond reasonable doubt'. Similarly, in a civil action, where the outcome is decided 'on the balance of probabilities', there are

procedural requirements which reflect the rights and duties of the parties in dispute, and these are likewise matters of ongoing debate.

Procedural considerations are also an important component of social justice and how administrative agencies should treat individuals is not a settled matter. However, there would appear to be a fair measure of agreement that, in applying policies to individuals, like cases should be dealt with alike, policies should not be applied retrospectively (unless it is to the advantage of the individuals concerned to do so), people should be shown respect, their circumstances should be investigated thoroughly, and their claims should be decided impartially and expeditiously irrespective of the outcome.

The Relationship between Procedural Fairness and Substantive Justice.

There are basically two approaches to understanding the relationship between procedural fairness and substantive justice. The first approach, which is clearly an instrumental one, asserts that fair procedures can be identified in terms of their contribution to the outcome of the decision. Thus fair procedures are those which lead to correct, and in that sense, just decisions. The second, non-instrumental approach asserts that fair procedures are important for their own sake, because they reflect and protect beliefs about how people should be treated, whether or not they result in just outcomes.⁹

Procedural fairness is instrumental to substantive justice

The first approach emphasises the link between process and outcome. Thus, assuming it is possible to identify a 'correct' outcome, a given procedure is justified to the extent that it results in such an outcome. However, as Geneva Richardson points out, there are a number of problems with this approach.¹⁰ First, there may be no uniquely correct outcome – while the facts may be agreed, the precise implications of law or policy in relation to them may be hotly contested. Second, even if there is a

uniquely correct outcome, it may be very difficult to specify those procedures that are most likely to deliver it. Third, procedures are not free and, if efficiency is taken into account, the optimum level of procedural protection will be that which minimises both the costs of the procedure (*direct costs*) and the costs of reaching an incorrect decision (*error costs*). While the identification of direct costs may be relatively straightforward (since it involves identifiable items like the salaries paid to those involved and associated overhead costs), the calculation of error costs (the cost to the individual of a wrongful prosecution, of failure in an action where they had a legitimate claim or of wrongly denying someone what they are entitled to) can be exceedingly difficult. This problem will be revisited later in the chapter.

Substantive rights call for procedural protection

Ronald Dworkin introduces another element into the calculation of error costs.¹¹ Using the criminal law as an example, he distinguishes between two types of harm, *bare harm* and *moral harm*. The innocent suspect who is mistakenly convicted and punished suffers bare harm in being sent to prison. In addition, he or she suffers moral harm in being wrongly deprived of the right not to be punished when innocent. These additional moral costs stem from the infringement of a right and, according to Dworkin, justify greater expenditure on procedures designed to avoid wrongful convictions than on procedures designed to avoid wrongful acquittals. For Dworkin, having a substantive right triggers a secondary right to procedural protection. This does not only apply in relation to the criminal law but applies equally in relation to civil law¹² and, by extension, to administrative law. Although the distinction which Dworkin makes enhances the attractiveness of the instrumental approach, the downside is that, where there are no substantive rights, it would seem to follow from his argument that individuals have no enforceable claim to any specific form of procedural protection, and that procedural fairness is essentially a matter of policy.

Perfect, imperfect and pure forms of procedural justice

In dealing with the relationship between procedural fairness and substantive justice, Rawls makes a distinction between *perfect*, *imperfect* and *pure* forms of procedural justice.¹³

- *Perfect procedural justice* has two characteristic features. First there is an independent criterion for determining what a fair division is and, second, it is possible to devise a procedure that is certain to have this result.
- *Imperfect procedural justice* has only the first of these features. While there is an independent criterion for determining what the outcome should be, there is no way of specifying a procedure which will always produce this result. However, some procedures may be regarded as more likely than others to produce the right outcomes in the majority of cases.
- *Pure procedural justice* has neither of these features. There is no independent criterion for determining the right outcome: instead there is a correct or fair procedure such that the outcome of applying it, whatever that may be, should be regarded as correct or fair provided that the procedure has been properly followed. In this kind of procedural justice, the justice of any outcome is founded on the fairness of the institutional arrangements from which it arises.

Since procedures which always lead to just outcomes can rarely, if ever, be devised, perfect procedural justice has little practical relevance. Imperfect procedural justice is exemplified by existing criminal, civil and administrative procedures, although there will always be arguments about whether or not they actually minimise the number of false positives and false negatives and thereby facilitate the attainment of correct outcomes.¹⁴ Pure procedural justice is exemplified by a lottery or a 'free market', although Rawls, in developing his contractual theory of justice – based on the principles of justice people would choose if they chose them 'under a veil of

ignorance', i.e. ignoring everything they already know about themselves and the society in which they happen to live, – argues, in effect, that just outcomes will result from the adoption of fair procedures.¹⁵

Procedures are primarily instrumental but also reflect authoritative standards

According to Galligan, procedures are purposive and the first and primary concern of procedures is to lead to desired outcomes. However, a second concern is to ensure that what he calls 'contextual values' are respected. While one sense of fairness consists in achieving the outcomes required by law, a second sense of fairness is linked to these other values and is satisfied when they are respected.¹⁶ Within different legal procedures (Galligan lists dealing with a matter according to legal standards, deciding as an official thinks best, reaching agreement between the parties, investigating a situation and reporting on the results, and adopting a framework based on participation where no precise standards are laid down in advance), Galligan claims that there are authoritative standards based on tiers of values which constitute the standards of fair treatment, so that a person treated in accordance with them is treated fairly and the procedures are fair to the degree that they have this result.¹⁷ The first tier consists of the standards of the particular area of criminal law, civil law or administrative law, which dictate the basic legal objectives that apply in the case in question and are directed towards achieving particular outcomes. The second tier comprises standards from cognate sources, e.g. the common law, neighbouring statutes or policy imperatives, which qualify, modify or augment the first tier of outcome-based standards. The third tier is even more general and draws on social principles, which include but go beyond legal principles. Some standards have an impact on outcomes, directly or indirectly, others place constraints on the course of action that leads to outcomes, while a few may be entirely independent of outcomes.¹⁸ Procedures are thus contingent on serving some end, purpose or value and are therefore neither intrinsically fair nor intrinsically unfair.

Procedures reflect values which are independent of outcomes

The claim is often made that the need to provide procedural fairness springs from the obligation to respect a person's dignity and autonomy as a human being.¹⁹ However, Bayles argues that process values are not derived solely from the dignity and autonomy of individuals but are what 'rational persons would accept for use in a society in which they expected to live'.²⁰ Examples of such values are participation, equal treatment, intelligibility, timeliness and confidence in the decision-making process. Although some of the procedures which give effect to these values may promote accuracy, Bayles argues that they should be assessed independently of such effects. It follows that procedures should not be evaluated solely in terms of the extent to which they minimise the sum of direct costs plus error costs (arising from false positives and false negatives) but should also take into account process benefits, i.e. the positive benefits which follow from giving effect to process values.²¹ He also argues that procedural principles are not relevant across the board and that their appropriateness depends on the characteristics of the decision-making process in question. He distinguishes between adversary adjudication, bureaucratic investigation, directorship, professional service and negotiation, specifies when each is appropriate, and identifies which principles of procedural justice apply in each case.²²

Although there is much to commend in Bayles' approach, not least his acceptance of the relative autonomy of procedural values and his contention that principles derived from adversarial proceedings in front of the courts may not be appropriate in all contexts, there are clearly problems with it. It is not clear, in the same way as it is not clear with Rawls' account of the 'original position', why rational people would all choose the same set of principles. And, even if they did, it is not clear that they would order them in the same way. Bayles does not deal with the issue of ordering and this is a major shortcoming since many of the principles are competitive, i.e. the more you have of one, the less you can have of another. This can be illustrated by means of an example. The greater the emphasis on participation, the harder it will be to reach decisions timeously; on the other hand, the greater the emphasis on timeousness, the

less likely that individuals will be able to participate fully in the decision-making process. The principles of procedural justice not only compete with each other but have a price tag attached to them, which means that they compete with other principles such as efficiency. Unfortunately Bayles does not consider such issues.

Although it can be argued that considering a principle like efficiency involves appealing to a concept unrelated to justice, it is clearly unrealistic to ignore the issue of costs. Allocating additional resources to the decision-making process can be expected to enhance the probability of achieving a correct outcome but no society can be expected to devote all its resources to enhancing its decision-making procedures. Trade-offs are required.

Conclusions

It has been argued in this section that procedural considerations apply to social justice in the same way as they apply to legal justice. The relationship between process and outcome, i.e. between procedural fairness and substantive justice has been examined, and a number of different positions identified. Some of the problems associated with a purely instrumental view of procedures were identified and Dworkin's view that substantive rights call for procedural protection considered. Although it constitutes an important advance, I do not think it goes far enough. Two non-instrumental views were then considered: Galligan's view that, although the primary function of procedures is to lead to desired outcomes, a secondary function is to reflect 'authoritative standards based on tiers of values' which include but go beyond legal principles, and Bayles' view that process values, which are independent of outcomes, and are what 'rational persons would accept for use in a society in which they expected to live' provide the basis for evaluating procedures. Although there are differences in emphasis between these two views, they both recognise that, although procedural fairness can contribute to substantive justice, it does not only have instrumental value but can be justified in its own terms. Moreover, they both recognise that a uniform set of procedural principles does not apply across the board

and that the appropriateness of any set of procedural principles depends on the characteristics of the decision-making process in question.

PART 2: THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE

Early Studies: Thibaut and Walker

Some 25 years ago, the American social psychologists, John Thibaut and Laurens Walker attempted to define and clarify the nature of procedural justice through the application of social psychological methods to courtroom disputes.²³ They hypothesised that litigants' satisfaction with dispute resolution outcomes would be independently influenced by their assessments of the fairness of the dispute resolution process.

Thibaut and Walker distinguished between process control (control over the opportunity to present evidence) and decision control (control over the final decision), and used experimental methods to test their hypothesis. Their results showed that the method of reaching a decision, as well as the outcomes from it, is important in determining perceptions of fairness and satisfaction, and that adversarial procedures are preferred to inquisitorial ones, mainly because they give the parties greater process control over the decision-making process. On this basis, they concluded that procedures that are high in process control should be used in disputes dominated by conflicts of interest because, in spite of the fact that information gathering is biased, such procedures are most likely to ensure the consideration of individual circumstances that is needed to maximise fairness.

Subsequently another American social psychologist, Gerald Leventhal, using an approach based on 'equity theory', put forward a model which can be applied to a wide range of non-legal contexts.²⁴ He identified six justice rules (consistency, bias suppression, accuracy of information, correctability, representation and ethicality) and, although he did not carry out any empirical research himself, subsequent research

confirms the importance of four of them, namely consistency, accuracy, bias suppression, and representation, indicating that there are four potential underlying dimensions of procedural justice.

In the course of a review of social psychological studies of procedural justice, Lind and Tyler claim that Leventhal overestimated the impact of favourable outcomes and distributive justice on judgements of procedural justice and conclude that the most serious inaccuracy in his work was his belief that procedures are of less importance than outcomes in determining judgements of overall fairness.²⁵

Recent Studies: Tyler

More recently, Tom Tyler set out to test the importance of criteria of procedural justice which he derived from the theories of Thibaut and Walker, and Leventhal.²⁶ As he points out, Thibaut and Walker's two categories (process control and decision control) map on to Leventhal's representation category but Leventhal's other categories do not have any equivalents in Thibaut and Kelly's study.²⁷ His research set out to test the importance of a composite set of categories and to determine whether Thibaut and Walker's empirical findings are specific to courtroom settings or can be generalised across a wider range of contacts with legal authorities, whether they apply when the contact is voluntary as well as when it is involuntary, and whether the meaning of fairness varies with sex, age, race, education, income and 'liberalism'.

Tyler's sample comprised 652 persons who had personal experience of the police and/or the courts in the previous 12 months. *Process control* was measured in terms of how much opportunity respondents had to present their problem or case to the authorities before decisions were made; *decision control* by how much control they had over the decision made by the authorities. *Consistency* involved comparisons with previous experience, prior expectations, what they thought happened to others or the experiences of friends, family or neighbours. *Impartiality* was measured by

combining responses to two questions: whether the authorities did anything that was ‘improper’ or ‘dishonest’ and whether officials had lied to respondents, and also by asking respondents how hard the police or judge had tried to be fair. *Accuracy* was also measured by combining the responses to two questions: whether the authorities had the information they needed about how to make good decisions and how to handle the problem, and whether they had tried to bring the problem into the open so that it could be solved. *Correctability* was measured by asking respondents whether they knew of an organisation to which they could have complained about unfair treatment. Finally, *ethicality* was measured by combining responses to two questions: whether the authorities had been polite to the respondents and showed concern for their rights. Respondents were also asked how fair the procedures used by the organisation were and how fairly they had been treated, with both answers rated on a four-point scale. The results were as follows:

- Process and outcome, i.e. procedural fairness and substantive justice, were strongly related.
- Seven aspects of process made an *independent* contribution to assessments of procedural fairness: the effort of the authorities to be fair; their honesty; whether their behaviour is consistent with ethical standards; whether opportunities for representation are given; the quality of decisions made; whether opportunities to appeal decisions exist; and whether the behaviour of authorities shows bias.
- Contrary to expectations, consistency between the ways in which they are treated their previous experiences, prior expectations, and their perceptions of the ways in which others are treated, was not important; but ethicality was.
- The criteria used to assess the fairness of an experience were similar to those used to assess the fairness of the authorities involved. In both cases, the effort to be fair, ethicality, honesty, and representation were important.

- Individuals judge procedural fairness by using a variety of positively inter-related criteria. Factor analysis suggests that there are two underlying factors: the first factor includes assessments of the nature of the experience itself (i.e. opportunities for representation, impartiality and the quality of the decisions made); the second factor includes assessments that compare the experience to external standards (i.e. consistency and ethicality).
- In different situations (voluntary vs. involuntary contact, favourable vs. unfavourable outcomes), individuals judge the fairness of procedures using different criteria.
- There was no evidence that different types of people judge the fairness of procedures differently.

Tyler concludes that his findings strongly support previous research in demonstrating that a key determinant of reactions to encounters with legal authorities is the person's assessment of the fairness of the procedures which are used.²⁸ As far as the meaning of procedural fairness is concerned, people's judgements are clearly complex and multifaceted. Although people pay attention to seven criteria, the major ones are linked to outcome (ethicality, honesty and the effort to be fair) rather than consistency with other outcomes, and Tyler speculates that this may be because people lack the information to make judgements of consistency. Representation is only one of a number of concerns that influence people's judgements and how hard authorities try to be fair appears to be the key overall factor. However, concern with ethicality (politeness and a concern with rights) is also important.

Galligan's Critique

Galligan has subjected Tyler's study to some strong criticism, on the grounds that Tyler misunderstands the relationship between procedures and outcomes and fails to appreciate that the primary significance of procedural notions (like hearing and bias) is

in upholding normative expectations relating to outcomes.²⁹ Galligan concedes that procedures are particularly salient where normative expectations regarding outcomes are uncertain. However, he goes on to say that, even in such circumstances, procedures are still justified as a means to the achievement of certain outcomes, and to argue that empirical research should take account of this, since failure to do so leads to the unwarranted conclusion that procedures have their own normative foundations and that people assess fairness in terms of these norms.

Galligan concludes that Tyler's research, and that of other psychologists, is based on an unsatisfactory theoretical framework and a misunderstanding of the relationship between normative expectations in relation to procedures and normative expectations in relation to outcomes.³⁰ He claims that the theoretical framework which informs these studies assumes what it purports to demonstrate, namely that procedures have their own normative foundation and that people assess fairness primarily on that basis. According to him, empirical research based on such a framework is defective and conclusions that are derived from it must therefore be questioned. He then goes on to outline an alternative approach which seeks to identify, within a given context, standards of fair treatment without insisting on a strict division between those relating to outcomes and those relating to procedures. The result of such research would, he claims, point to a cluster of values and standards of different kinds, each of which contributes an element to an overall sense of fair treatment. It follows from this that fair procedures are simply those procedures that lead to fair treatment according to authoritative standards.

Is Galligan's criticism fair? I think not. Tyler's findings, and those of others who work in the same tradition, are, of course, shaped by their *a priori* theorising about the relationship between process and outcome, and thus between procedural fairness and substantive justice. However, the models that inform their work are not especially prescriptive and the conclusions from Tyler's study, and, indeed from other studies, that people assess the fairness of procedures independently from the fairness of outcomes, are based on the results of carefully documented empirical research. As

Lind and Tyler demonstrate, Thibaut and Walker's early research findings have been replicated in other studies³¹ and the gist of subsequent work has been that procedure and process *per se* are more important and outcomes less important than their theory indicates.³² Lind and Tyler go on to claim that the picture that seems to be emerging is that people are rather more concerned with their interactions and rather less concerned with the outcome of their interactions than one might have supposed.³³ Moreover, they point out that more recent studies have broadened the scope of procedural justice research to include the study of allocation procedures and that such research indicates that procedural concerns are important when allocation decisions are being made and when organisational policies are being determined.³⁴ Against the weight of empirical evidence that perceptions of procedural fairness exercise an independent effect on responses to favourable and unfavourable outcomes and on perceptions of distributive justice, it is not clear how damaging Galligan's criticisms are or how much weight should be given to them.

Conclusions

Two important conclusions can be drawn from the body of social psychological research reviewed above. First, empirical research in a variety of settings has repeatedly demonstrated that perceptions of procedural fairness exercise an independent effect on responses to favourable or unfavourable outcomes and on perceptions of distributive justice. Second, people use different criteria to judge procedural fairness in different decision-making contexts. However, notwithstanding the reference to recent research on allocation procedures, it should be noted that the studies on which these conclusions are based were all carried out in the field of criminal justice. Whether or not they apply to other areas of law, i.e. to civil and administrative law, has still to be demonstrated.

It is, of course, important to ask whether procedural fairness and substantive justice can be studied in terms of the perceptions of those who are subject to official decision-making, and what studies of perceptions of justice tell us about justice itself.

The well-known maxim 'justice must not only be done but must also be seen to be done' suggests that perceptions of justice are very important. In addition, although the research referred to in this section of the chapter does not settle the matter, it provides strong support for the claim that procedural fairness should not be seen in purely instrumental terms. Procedural fairness can contribute to substantive justice³⁵ but is also important in its own right.

PART 3: EXTERNAL AND INTERNAL APPROACHES TO PROCEDURAL FAIRNESS

Two approaches to procedural fairness

One approach to the achievement of procedural fairness emphasises principles that are imposed on the administration by institutions that are *external* to it, in particular by the courts but also by agencies like 'ombudsmen', as a result of an individual challenging an administrative decision. Another approach emphasises principles that are put into place *internally*, i.e. by the administration itself, perhaps as a result of some internal monitoring of administrative decisions. The distinction is an analytic one and, in practice, the two approaches may be combined. Each of them is considered in turn.

External Approaches

Procedural Protection for 'Adjudicative' Decisions

As Harlow and Rawlings note, there has been a general tendency for the courts to model the administrative process in their own adjudicative image.³⁶ Lon Fuller identified the distinguishing characteristic of adjudication as being to confer 'on the affected person a peculiar kind of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour'.³⁷ This implies that, for a decision to be adjudicatory, certain procedural constraints must be placed on the

decision-maker. The model of procedure which facilitates the presentation of ‘proofs and reasoned arguments’ is exemplified by the criminal and civil courts, but it is also found in other settings, such as tribunal proceedings, which share some of the same features. Actual decision-making may have all or some or none of the characteristics of adjudication and Harlow and Rawlings conceive of a sliding scale – the closer to the ideal type outlined above, the more judicialised the process and the more the courts will insist on applying the rules of natural justice (the unwritten rules of the common law which include the so-called ‘rule against bias’ and the right to a hearing); the further away, the less judicialised the process and the less the courts will insist on applying such principles.³⁸

The Donoughmore Committee, reporting in 1932, sought to distinguish three categories of decision-making, namely ‘judicial’, ‘quasi-judicial’ and ‘administrative’ decision-making, each of which was based on a different type of dispute, but their thinking was crude and their arguments circular.³⁹ The Committee’s approach has some attractions for ‘green light theorists’, who assume that the state is the only effective guarantor of individual freedom and emphasise the role of legislation and regulation rather than the use of the courts, because it serves to insulate administrative decisions from legal scrutiny. However, it has been criticised on the grounds that it has proved to be very difficult (if not impossible) in practice to separate these three types of functions, and because one effect of applying it would be to deprive large numbers of decisions of any procedural protection on the grounds that they are ‘administrative’. The Committee’s approach had little attraction for red light theorists, who assume that the state is a threat to the freedom of the individual and favour a strong role for the courts in scrutinising the legality of administrative decisions.⁴⁰

More flexible approaches

Exponents of ‘flexible’ protection claim that it provides a way round the problems of classifying disputes, of applying the rules of natural justice to those that are classified

as 'adjudicatory' and offering no protection at all to those that are classified as 'administrative'. Mullan argues that different types of decision-making have different procedural requirements, that the more closely they resemble 'straight law/fact determinations resulting in serious consequences for those concerned, the more legitimate is the demand for procedural protection, while the more closely they resemble broad, policy orientated decisions, the less they are in need of such protection'.⁴¹ Although this approach avoids the problems of classification, and claims to recognise that different types of decision require different forms of procedural protection, it operates with only one model of procedural fairness and cannot provide any protection for decisions that involve the application of policy. A further problem is that the optimum degree of protection is not instantly recognisable and that a fair measure of discretion is required.

This position has led Harlow and Rawlings to question how far it is the court's job to pursue the optimum form of procedure for different kinds of decision.⁴² They doubt whether judges have the information or the expertise needed to determine the particular form of procedural protection that is appropriate for different types of decision and, even, whether such an activity is consistent with the rule of law. Leaving these normative issues aside, they claim that there has been a measure of increased activism and of greater flexibility of response.⁴³ However, such developments still leave broad swathes of 'administrative' decisions unprotected by the courts.

Disputes between the citizen and the state are more likely to be heard by a tribunal than by a court and, in 1957, the Franks Committee enunciated three principles that were to apply to tribunal decision-making.⁴⁴ According to Franks, these principles were *openness, fairness and impartiality*: openness requires publicity for the proceedings and knowledge of the essential reasoning underlying the decision; fairness requires the adoption of clear procedures which enable the parties to understand their rights, present their case fully and know the case which they have to meet; while impartiality requires freedom from the influence, real or apparent, of departments

concerned with the subject matter of their decisions.⁴⁵ However, it should be noted that these principles apply to tribunals which hear appeals from first instance administrative decisions and not to the decisions themselves and that, in any case, they represent 'good practice' and are not enforceable. Although the role of the Council on Tribunals, set up under the Tribunals and Enquiries Act 1959, is to keep the constitution and working of tribunals under review, its powers are very limited.⁴⁶

In spite of these shortcomings, judicial review can obviously make a difference for the individual who uses it to redress a grievance. As a result, it can have an effect on policy and legislation. However, its impact on routine administrative decision making is more problematic.⁴⁷ Because judicial review is used relatively infrequently, because first-instance decision makers may not know about relevant court decisions or feel any commitment to applying these decisions, let alone the principles underlying them, it does not provide a very effective check on routine administrative decision making.⁴⁸ Tribunals hear many more cases but they also have a rather limited effect on first-instance decision makers. In a study of decision making in social security,⁴⁹ just over half (52.6 per cent) of adjudication officers claimed that, in making decisions, they were not at all influenced by a tribunal's likely response to an appeal. This compares to a quarter (25.0 per cent) of officers who claimed that tribunals had a procedural effect in that the prospect of an appeal led them to be more thorough and document their decisions more fully.⁵⁰

Procedural Protection for 'Administrative' Decisions

The first Parliamentary Commissioner for Administration (or Parliamentary Ombudsman) was appointed in 1967 to deal with grievances from individuals who felt they had suffered an injustice arising from maladministration by a central government department against which there was no available remedy. 'Maladministration' was not defined in the Parliamentary Commissioner Act 1967 that established the PCA, although the Leader of the House of Commons (Richard Crossman) described it as including:

bias, neglect, inattention, delay, incompetence, ineptitude, perversity, terpidity, arbitrariness and so on.⁵¹

subsequently, a Parliamentary Commissioner (Sir William Reid) elaborated on Crossman's list by giving more examples of what the term covers.⁵²

- rudeness (though that is a matter of degree);
- unwillingness to treat the claimant as a person with rights;
- refusal to answer reasonable questions;
- neglecting to inform a complainant on request of his or her rights or entitlement;
- knowingly giving advice which is misleading or inadequate;
- ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
- offering no redress or manifestly disproportionate redress;
- showing bias, whether because of colour, sex, or any other grounds;
- omission to notify those who thereby lose a right of appeal;
- faulty procedures;
- failure by management to monitor compliance with adequate procedures;
- cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- partiality; and
- failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly unequal treatment.

'Injustice' was likewise not defined in the Act but, for a complaint to be upheld, the PCA must conclude that the individual suffered some kind of loss that would otherwise not have occurred. Thus, in light of the distinction made in Part 1 above, it is clear that the PCA adopts an instrumental rather than a non-instrumental approach to procedural fairness since redress is only available if maladministration has a

deleterious effect on the outcome of administrative decision making.⁵³

A number of other ombudsmen were subsequently established to deal with complaints about services in the public sector that fell outside the PCA's remit. They include the Health Services Ombudsmen for England and Wales and for Scotland; the Commissioners for Local Administration (CLA) for England and Wales and for Scotland; and the Police Complaints Authority. In addition, some public services, e.g. the Inland Revenue, Customs and Excise, the Prison Service (in England and Wales, and in Scotland), and the Driver and Vehicle Licensing Agency (DVLA) have appointed independent adjudicators to consider complaints against the organisation. There are also ombudsmen covering various private sector services such as banking, broadcasting, building societies, estate agents, funerals, insurance, investments, legal services and pensions but, with the exception of the Legal Services Ombudsmen for England and Wales and for Scotland, and the Pensions Ombudsmen, these do not have statutory powers.⁵⁴

Ombudsmen use inquisitorial methods to investigate allegations that maladministration has given rise to injustice. Where a complaint that maladministration has given rise to injustice is upheld, they may impose *remedial action* on the organisation that was the subject of the complaint; award *compensation* to the complainant; or instruct the organisation to issue an *apology*.⁵⁵ Thus, in addition to providing remedies for those who complain, ombudsmen may order the organisation complained of to modify its administrative procedures. However, although an organisation may wish to do so to avoid more complaints in the future, there is, in general, no systematic check on whether or not it has done so.

Ombudsmen are independent of the organisation against which the complaint is made, no legal (or other) representation is required, and complainants are not subject to any charges. Independence should, in theory, guarantee impartiality but this may be compromised in practice by the fact that the ombudsman's staff is often drawn from, and sometimes returns to, the organisation which is the subject of the complaint. In

addition, there are often barriers which have to be surmounted before a complaint can be made to an ombudsman and, except for the CLA in Northern Ireland, ombudsmen's remedies are not legally enforceable.⁵⁶

A successful complaint to an ombudsman, like a successful application for judicial review, can make a difference for the individual who uses it to redress a grievance. However, because ombudsmen are used even more sporadically than judicial review, because their decisions usually relate to quite specific sets of circumstances and because they do not carry the force of precedent, they provide a rather feeble check on routine administrative decision making.

Internal Approaches

Mashaw's approach

While most people have looked to courts and tribunals, and to other forms of accountability, such as ombudsmen, which are external to the locus of organisational decision making, as the means of achieving procedural fairness, the available evidence does not suggest that this approach is very effective. It is for this reason that Jerry Mashaw has argued that additional safeguards, such as internal quality controls and quality assurance systems, are needed to ensure that the process of decision-making is fair.⁵⁷

In his pioneering study of the American Disability Insurance (DI) scheme,⁵⁸ Mashaw detected three broad strands of criticism leveled against it: the first indicted it for lacking adequate management controls and for producing inconsistent decisions, the second for not providing a good service and for failing to rehabilitate those who were dependent on it, and the third for not paying enough attention to 'due process' and for failing to respect and uphold the rights of those dependent on it.⁵⁹ He argues that each strand of criticism reflects a different normative conception of the DI scheme, i.e. a different model of what the scheme could and should be like. The three models

are respectively identified with *bureaucratic rationality*, *professional treatment* and *moral judgment*.

Mashaw defines *administrative justice* (the procedural fairness inherent in routine day-to-day administration) in terms of ‘those qualities of a decision process that provide arguments for the acceptability of its decisions’.⁶⁰ Two points of clarification are called for here: by ‘acceptability’, it should be assumed that Mashaw means something like ‘legitimacy’ and by ‘decisions’ that he is referring to procedures rather than outcomes. The importance of administrative justice is that it can legitimate administrative procedures.

It follows from Mashaw’s definition that each of the three models he described is associated with a different conception of administrative justice. Thus, there is one conception of administrative justice based on bureaucratic rationality, another based on professional treatment and a third based on moral judgment. According to Mashaw, each of these models is associated with a different set of *legitimizing values*, different *primary goals*, a different *organisational structure* and different *cognitive techniques*.⁶¹ These are set out in the Figure 1 below.

Figure 1: Three Normative Models of Administrative Justice
[as set out by Mashaw (1983: 31)]

Dimension/ Model	Legitimizing Values	Primary Goal	Structure or Organisation	Cognitive Technique
bureaucratic rationality	accuracy and efficiency	program implementation	hierarchical	information processing
professional treatment	service	client satisfaction	interpersonal	clinical application of knowledge
moral judgment	fairness	conflict resolution	independent	contextual interpretation

Although this is very helpful, the association of fairness with one of the models (the moral judgment model), and the implication that the two other models are ‘unfair’, is unfortunate. Mashaw’s approach suggests that each of the three models he described

is associated with a different conception of fairness. In addition, his characterisation of the three models reflects an exclusively internal approach to administrative justice in that it makes no reference to external mechanisms for redressing grievances. With this in mind, I have revised Figure 1 to produce Figure 2. This renames the three models (it refers to them as a *bureaucratic* model, a *professional* model and a *legal* model), alters the ways in which they are characterised,⁶² and highlights redress mechanisms that include external as well as internal procedures for achieving procedural fairness. This is important because internal and external procedures should not be seen as alternatives and it is important to recognise that, in practice, they are often combined.

Figure 2: Three Normative Models of Administrative Justice
[based on Adler and Longhurst (1994: 44)]

Model	Mode of Decision Making	Legitimating Goal	Mode of Accountability	Characteristic Remedy
bureaucracy	applying rules	accuracy	hierarchical	administrative review
professionalism	applying knowledge	expertise	interpersonal	complaint to a professional body
legality	asserting rights	rule of law	independent	appeal to a court or tribunal

Mashaw contends that each of the three models is coherent, plausible and attractive. He also argues that the three models are *competitive* rather than *mutually exclusive*.⁶³ Thus, they can and do coexist with each other. However, other things being equal, the more there is of one, the less there will be of the other two. His insight enables us to see both what trade-offs are made between the three models in particular cases and what other trade-offs might be more desirable. His approach is a *pluralistic* one, which recognises a plurality of normative positions and acknowledges that situations that are attractive for some people are unattractive for others.

Mashaw’s pluralism can be contrasted with the *communitarian* version of pluralism adopted by other writers on justice, most notably by Michael Walzer.⁶⁴ Walzer accepts that ‘the principles of justice are themselves pluralistic in form [and that]

different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents.⁶⁵ However, he also claims that 'the meaning of the goods in question determines their distribution' and argues that 'if we understand what it is, what it means for those for whom it is a good, we understand how, by whom, and for what reasons it ought to be distributed'.⁶⁶ Although Walzer accepts that social meanings are historical in character and that what is regarded as just and unjust changes over time, he nevertheless assumes a degree of normative consensus in a given community, which stands in stark contrast with Mashaw's assumption of normative conflict.

The trade-offs that are made, and likewise those that could be made, reflect the concerns and the bargaining strengths of the institutional actors who have an interest in promoting each of the models, typically civil servants and officials in the case of the bureaucratic model; professionals and 'street level bureaucrats'⁶⁷ in the case of the professional model; and lawyers, court and tribunal personnel and groups representing clients' interests in the case of the legal model.

These trade-offs vary between organisations and, within a given organisation, between the different policies delivered by that organisation and between the different stages of policy implementation. They also vary over time and between countries. In the case of the (American) DI scheme, Mashaw concluded that, in the early 1980s when he carried out his study, bureaucratic rationality was the dominant model and it is, at least, arguable that, notwithstanding variations within and between countries, bureaucracy is, and always has been, the dominant model as far as the administration of social security is concerned. However, the professional model may be dominant in other policy fields, e.g. the administration of health care. And, although the legal model has always been extremely important in countries with a strong rights culture, such as the USA, it is now beginning to mount a serious challenge to the dominant bureaucratic and professional models in many European welfare states.⁶⁸

Mashaw's approach is a very attractive one. Although, as shown in Part 1 above,

Bayles and Galligan⁶⁹ both recognise that a uniform set of procedural principles does not apply across the board, and that the appropriateness of any set of procedural principles depends on the characteristics of the decision-making process in question, their approaches to procedural fairness are less sophisticated than Mashaw's in that they assume that the different forms of decision making are *sui generis*. The great strength of Mashaw's approach is his recognition that different models of decision making co-exist with each other and that each of them is associated with a different conception of administrative justice. The administrative justice of any given instance of decision making is not represented by the procedural principles associated with the single model that best describes that form of decision making but by trade offs between each of the models for which there is some evidence.

Mashaw's approach has, however, been subjected to a number of criticisms. Although he contends that the three models described above, and only these three models, are always present in welfare administration, this claim can be disputed. The bureaucratic, professional and legal models have, in many countries, been challenged by a managerial model associated with the rise of new public management,⁷⁰ a consumerist model that focuses on the increased participation of consumers in decision making⁷¹ and a market model that emphasises consumer choice.⁷²

A second criticism is that, in assessing the relative influence of the three models, Mashaw ignores their absolute strengths. Consider two situations in which the strengths of three models are given weights of 30, 20 and 10 units and 3, 2 and 1 units – although they are identical in a relative sense, they are quite different in absolute terms and clearly refer to what are, in reality, very different situations'. 'Strong' balances are very different from 'weak' balances in ways that Mashaw's analysis does not bring out very well.

A third criticism is that Mashaw takes the policy context for granted.⁷³ However, just as different approaches to administration, i.e. to how programmes should be run, can be understood in terms of a number of normative models which are in competition

with each other, so different approaches to policy, i.e. to what programmes aim to achieve, can also be understood in this way. As shown in Part 4 below, Adler and Longhurst⁷⁴ have demonstrated that Mashaw's approach can be applied to competing models of policy as well as to competing models of administration. Each of the models of policy may, in theory, be combined with each of the models of administration. The resulting 'two-dimensional' model is necessarily more complex but its characteristics are similar in that it not only enables us to see what trade-offs are made between different combinations of policy and administration in particular cases, but also to consider what different sets of trade-offs might be more desirable. Since, in the terminology used in this paper, the models of policy refer to outcomes while the models of administration refer to process, the two-dimensional model provides a way of combining procedural fairness with substantive justice.

In addition, Mashaw's approach would not commend itself to those, like Galligan, who associate administrative justice with the legal model of decision making and assert its moral superiority. Galligan claims that the great range of administrative processes can be divided into three groups: processes of a routine nature, decisions requiring distinct elements of inquiry and judgement, and discretionary processes of a policy kind.⁷⁵ At one end of the spectrum, routine administration involves the almost mechanical application of a set of standards to a simple and easily established set of facts; at the other end of the spectrum, decisions about how to treat an individual involve the exercise of strong discretion and are substantially governed by policy considerations; but, within the middle ground, two normative models of decision making compete with each other. He calls the first of these models *bureaucratic administration* and the second *administrative justice* and the association of this term with one of these models is particularly significant. According to Galligan, the goal of bureaucratic administration is to maximise the common good by means of 'accurate and proper' decision making and 'individual cases are significant only as elements in achieving acceptable aggregates'. On the other hand, administrative justice seeks to treat each person fairly. In this model, the accurate and proper application of authoritative standards is still important but the emphasis is on fair treatment of the

individual, i.e. on the accuracy and propriety of the individual decision, not just of decisions in the aggregate. Although Galligan accepts that the bureaucratic administration model is the 'natural and dominant' model, he argues that efforts should be made to curb its natural hegemony in order to support the (morally superior) administrative justice model. His approach is not followed here because of its normative commitment to one, among several, competing conceptions of procedural fairness and because of its failure to recognise the opportunity costs associated with its realisation.

Developing Mashaw's approach

In light of the criticisms made above, some modifications of Mashaw's analytic framework are clearly called for. First, it is important to recognise that, in addition to the *bureaucratic*, *professional* and *legal* models identified by Mashaw, some additional models of administrative justice need to be considered. Three such models are a *managerialist* model, a *consumerist* model and a *market* model,⁷⁶ although they are not necessarily all present in every administrative system. Second, account needs to be taken of the absolute as well as the relative strengths of these models. Third, the approach can be applied to competing normative models of outcomes, i.e. to substantive justice, as well as to competing normative models of process, i.e. to procedural fairness, and used to analyse the interactions between them.

An extended analytic framework, involving six normative models of administrative justice, is set out in Figure 3 below.

Figure 3: Six Normative Models of Administrative Justice

Model	Mode of Decision Making	Legitimizing Goal	Mode of Accountability	Characteristic Remedy
Bureaucracy	applying rules	accuracy	hierarchical	administrative review
professionalism	applying knowledge	expertise	interpersonal	complaint to a professional body
legality	asserting rights	rule of law	independent	appeal to a court or tribunal (public law)
managerialism	managerial autonomy	efficiency gains	performance indicators	publicity
consumerism	consumer participation	consumer satisfaction	Consumer Charters	'voice' and/or compensation through Consumer Charters
markets	matching supply and demand	profit making	to owners and shareholders	'exit' and/or court action (private law)

A brief explanation of this extended analytic framework is called for. Most public welfare services in the post-war period were shaped by the bureaucratic and professional models outlined above although the trade off between them varied from one policy domain to another. However, by the mid-1980s this pattern of administration had come under attack. It was variously criticised for lacking neutrality and being biased against certain groups; for its failure to contain the growing demand for cost savings; for having a vested interest in the maintenance and expansion of existing empires and not promoting the 'public interest'; and, as a 'monopoly provider' for being insulated from competitive pressures to become more efficient and more responsive to the demands and preferences of consumers. New and better forms of management were championed as the most appropriate response to these criticisms. Managerialism, as this approach came to be known, challenged the powers and prerogatives of bureaucrats and professionals in the name of managers who demanded the 'freedom to manage' the attainment of prescribed standards of service. It gave priority to achieving efficiency gains, introduced different forms of financial and management audit to assess how well the prescribed standards of service

had been met, rewarded staff who performed well and, in theory at least, sanctioned those who did not.⁷⁷ Inevitably, the introduction of these new managers frequently led to struggles for power and control within welfare organisations. Managerialism can thus be characterised in terms of managerial autonomy, the pursuit of efficiency gains, the use of performance indicators to assess accountability, and the possibility of drawing attention to the fact that prescribed standards have not been met as a means of putting pressure on management to improve their standards.

Consumerism has, likewise been a central reference point in the drive for public sector reform from the mid-1980s onwards.⁷⁸ Like managerialism, it has been taken up as a response to criticisms of the bureaucratic and professional and the reshaping of welfare services around consumer choice has been visible in a number of reforms, in particular in the introduction in the UK of the 'Citizen's Charter'.⁷⁹ Consumerism emphasises the role of the service user who is seen as an active participant in the process rather than a passive recipient of bureaucratic, professional or managerial decisions. It can thus be characterised in terms of the active participation of consumers in decision making, consumer satisfaction, the introduction of consumer 'charters', and the use of 'voice',⁸⁰ together with the possibility of obtaining compensation where the standards specified in the charter are not met as available remedies.

Markets constitute the final model in the extended analytic framework and have many of the characteristics of the managerial and consumerist models (although the reverse is not necessarily the case). Decision making in the market involves the matching of demand and supply and is made with reference to the price mechanism. Users are viewed as rational economic actors who choose the organisation that best satisfies their wants or preferences. The legitimating goal of the organisation is profit making, while the prevailing mode of accountability is to the owners or shareholders. In contrast to consumerism, where the consumer can use 'voice' as a remedy and can obtain compensation through the consumer charters if the specified standards have not been met, markets provide the possibility of 'exit'.⁸¹ In addition, an aggrieved

individual may be able to raise a court action for compensation where he or she suffers some measurable loss from the action or inaction of the administration. Internal or quasi-markets⁸² have some but not all of the characteristics of the market model just outlined.

It may seem a little strange to refer to some of these models, in particular, the market model, as models of justice. After all, markets are often regarded as threats to justice which undermine its achievement in practice. However, this strangeness is more apparent than real and results from equating the concept of 'justice' with substantive justice rather than with procedural fairness. One of the aims of this chapter is to demonstrate that procedural fairness is an important component of overall justice and that the idea that 'everyone should receive what is due to them' applies just as much to procedures as to outcomes. How people should be treated is very dependent on context and, as the discussion above tries to make clear, different conceptions of procedural fairness are associated with different types of decision making.

Consider the case of a lottery. Everyone who takes part has a legitimate expectation that they will be treated in exactly the same way (without any reference to their personal circumstances or characteristics) and have exactly the same chance of winning as everyone else. However, even if they invest a lot of money in lottery tickets or play the lottery for a long period of time, they cannot increase the probability that any particular ticket will hit the jackpot. Although the lottery generates a set of winners and losers, this is (or ought to be) a chance outcome and there is no underlying logic to it. If lottery outcomes are judged in terms of any one principle of distributive justice, or any combination of principles, they will no doubt be considered unjust. However, this is not the case for lottery procedures which may, or may not, incorporate the principles underlying the legitimate expectations referred to above. A similar argument applies to markets.

In a market, consumers can legitimately expect to have the opportunity to express their wants in terms of their preferences and the freedom to choose.⁸³ Likewise,

producers can legitimately expect to be able to respond to consumer choice and produce goods and services up to the point where the value to the consumer of his (her) marginal purchase just exceeds the cost of supply – beyond that point the consumer will not be interested in purchasing the service and it will not pay the producer to go on producing it. The price mechanism stabilises as well as controls these transactions – where there are shortages, higher prices act as an incentive to economise but, where the market is flooded, prices will fall and this will encourage consumers to buy more – while the profit motive should make supply responsive to demand, and encourage technological innovation and progress. Competition should lead to greater efficiency – successful producers will thrive (and make big profits) while unsuccessful ones will go to the wall. Thus, the market, like the lottery, generates winners and losers. However, since market theorists tend to treat the initial distribution of resources as an exogenous variable, assessing the final distribution of resources in terms of any one principle of distributive justice, or any combination of principles, will usually conclude that, like the lottery, they are not just.⁸⁴ This is because the market and the lottery both exemplify pure procedural justice.⁸⁵ But, although market outcomes are almost always not just, and it follows that markets do undermine attempts to achieve substantive justice, market procedures may incorporate the principles underlying the legitimate expectations referred to above and may thus be fair. It is in this sense, and only in this sense, that it does make sense to talk about the market as a model of justice.

Normative theorising

One of the attractions of Mashaw's approach is that it enables us to see both what trade-offs are made between the various justice models in particular instances and what different sets of trade-offs might be more desirable, not merely for the institutional actors who have an interest in promoting each of the models in play but for all concerned, i.e. in some overall sense. However, the attempt to arrive at a 'better' balance between the different models in play and identify a different set of trade-offs that will enhance 'the public interest' raises a number of problems. Since

there is no 'magic formula', this exercise necessarily involves the exercise of judgement. Of course, this does not make it an arbitrary exercise. It is one which can, and should, be informed by empirical data. In this connection, performance measures of various kinds and audit data are important and, to the extent that the primary justification for public services is that they should serve the public, it can be argued that the results of user surveys and public opinion data are especially important.

Conclusions

By adopting a relativistic approach to administrative justice, Mashaw's position, and that of others who have attempted to develop his approach, challenges the view that there are any invariant principles of procedural fairness that apply in all contexts.⁸⁶ This may, at first, seem surprising but, on reflection, should not be since it is generally agreed that this is true of substantive justice. Procedural fairness is no less a contested concept than substantive justice in that, although it can be defined in a fairly uncontroversial way (as 'a proper balance between competing claims to procedural protection'), the terms in which it is defined (i.e. what constitutes 'a proper balance' and even what are to count as 'claims') are the subject of considerable disagreement.⁸⁷ Compared to the external approaches to procedural fairness considered above, two of the advantages of an internal approach are that it focuses on the myriad of first-instance decisions rather than the much smaller number of decisions that are the subject of an appeal or complaint and that it focuses on them directly rather than at one remove and through a 'legal prism'. However, this is not to suggest that external mechanisms for achieving procedural fairness can be ignored. Although they are not all-important, they are certainly not unimportant. The two approaches to the achievement of procedural fairness need to be combined and one of the great strengths of the analytic framework outlined above is that, by embracing external as well as internal mechanisms for achieving procedural fairness, it recognises this fact.

PART 4: EMPIRICAL RESEARCH ON PROCEDURAL FAIRNESS

The approach to administrative justice outlined in Part 3 above has informed my research on the impact of computerisation on social security in the UK and on decision-making in the Scottish Prison system. It also provides the theoretical underpinning for comparative research on the assessment of special educational needs in England and Scotland and on the computerisation of social security in 12 countries. Although it is not for me to judge how successful it has been, and those with less at stake are clearly better placed to do so, an informed assessment calls for some familiarity with the research in question. This research is summarised below.

The Impact of Computerisation on Social Security in the UK

The three main aims of the *Operational Strategy*,⁸⁸ the massive programme to computerise the entire social security system that the Department of Social Security (DSS) attempted to put into place in the 1980s, were:

- to improve operational efficiency, reduce administrative costs and increase the flexibility of the operational system to respond to changing requirements;
- to improve the quality of service to the public, e.g. by treating customers in a less compartmentalised benefit-by-benefit manner and more as ‘whole persons’ with a range of social security business, and to improve the provision of information to the public;
- to modernise and improve the work of social security staff.

Of these aims, the first reflected the interests of the organisation, the second reflected the interests of the claimant and the third reflected the interests of the staff.

By 1989, the *Operational Strategy* had run into deep trouble – the costs had escalated so steeply that, unless improvements in quality of service were taken into account, it was clear that the future of the programme was in doubt. Against this background, Roy Sainsbury and I were commissioned by the DSS to undertake some research on

‘quality of service’ and, in particular, the on ‘whole person’ concept, the idea people should be treated in a less compartmentalised, benefit-by-benefit manner as ‘whole persons’ with a range of social security business to transact.⁸⁹ Using a consultative procedure known as the Delphi Method,⁹⁰ four panels of experts (drawn from DSS staff, welfare rights officers and representatives of pressure groups, academics and researchers, and persons with backgrounds in comparator organisations or from overseas social security systems) were invited to comment on the desirability and feasibility of a number of different conceptions of quality of service and of the whole person concept, and on a number of different models of organisation. But, in addition to these questions, we were interested in studying the effects of computerisation on administrative justice, i.e. on the procedural justice inherent in routine day-to-day administration.⁹¹

We argued that the three normative models of administrative justice set out in Figures 1 and 2 above were all present in the administration of social security, but that the *Operational Strategy* would further strengthen the dominance of the bureaucratic conception of administrative justice at the expense of the two competing conceptions. Thus, it was likely to lead to an even more bureaucratised system rather than one that was more sensitive to the needs and circumstances of claimants or one that made it easier for them to assert their rights. The main reasons for this were that the DSS adopted a ‘top-down’ approach to computerisation that gave priority to the interests of the organisation, rather than a ‘bottom up’ approach that would have given priority to the interests of claimants or staff; and that the aim of the programme was to make administrative savings rather than to improve quality of service (whatever that might mean). We concluded that the overall effect of the programme was certainly to alter but not necessarily to enhance the procedural fairness of administrative decision-making in social security.

Discretionary Decision-Making in the Scottish Prison System

During the late 1980s, Brian Longhurst and I undertook a programme of research on

day-to-day administrative decision-making in the Scottish prison system, focusing on adult, male, long-term prisoners who constituted the largest and, arguably, most problematic of the various groups that made up the prison population.⁹² We used documentary analysis, observation and interviews with a wide range of individuals inside and outside the Scottish Prison Service (SPS) to study in detail a number of important areas of decision making associated with classification, transfers, regimes and accountability.⁹³ In each case, we sought to establish what decisions were accomplished; why the existing system operated in the way it did; what problems were created by existing practices; for whom they were problematic; to what extent they gave rise to pressures for change; what alternatives to the present system were being canvassed; and what their implications for day-to-day decision-making would be. We used the same methods to study the policy-making process by carrying out a detailed examination of a series of policy documents that were published by the SPS during the period of our research.

The late 1980s was a period of great turbulence for Scottish prisons and a spate of violent disturbances had given rise to a vigorous debate about what prisons were for and how they should be run. Some people argued that, because so much was changing and it was far from clear what the eventual outcome would be, we were attempting to study Scottish prisons at a bad time. However, it turned out to be a very good time because the arguments advanced by powerful interests and their struggles for control actually helped us to construct a theoretical framework for our study. This theoretical framework enabled us to see the processes at work particularly clearly and to make sense of the prison system although it was in a state of flux. Using an iterative procedure based on 'wide reflexive equilibrium',⁹⁴ we were able to achieve a mutual adjustment between our theoretical framework and the empirical reality that was the focus of our research.

While our research on the *Operational Strategy* utilised the three normative models of procedural fairness set out in Figures 1 and 2 above, the turbulence of the prison system resulted in the calling into question of the various normative models of

substantive justice as well, and this suggested that we needed to consider them too. We associated each of the justice models with a distinctive discourse and distinguished ‘ends discourses’, which are concerned with what prisons are for, from ‘means discourses’, which are concerned with how prisons should be run. The discourses in play were characterised as follows:

Figure 4: Characteristics of three competing ‘Ends Discourses’

Discourse	Rehabilitation	Normalisation	Control
source of legitimacy	improving the individual.	prevention of negative effects of prison; treating prisoners like individuals in the community.	control of disruption; smooth running of establishments.
focus	‘deviant’ individual	‘normal’ individual	‘disruptive’ individual
dominant concerns	socialising the prisoner back into society through the provision of training and treatment.	minimum security; contact between the prisoner and his or her family; improved living conditions.	good order and discipline; protection of prison staff.

Figure 5: Characteristics of three competing ‘Means Discourses’

Discourse	Bureaucracy	Professionalism	Legality
source of legitimacy	rules and regulations	knowledge based on experience	rule of law
focus	on the system	on establishments	on individual prisoners
dominant concerns	uniformity, consistency, fidelity to the rules	leadership, experience, judgement, enhancing the institutional ethos	respect for prisoners rights
accountability for decisions	internal	negotiated	external

The ends and the means discourses were combined to produce a *discourse matrix* that summarised the discursive structure of the Scottish prison system at the time. Discourses which characterised individuals, groups and institutions within the Scottish prison system were associated with each of the cells in the matrix.

Figure 6: Discourse Matrix for the Scottish Prison System

	Rehabilitation	Normalisation	Control
Bureaucracy	Parole Board	HQ – Administration Division	HQ – Operations Division
Professionalism	Barlinnie Special Unit	Most governors	SPOA
Legality	‘Left realist’ academics, SCCL	Rights-orientated governors, SACRO	Judges and courts

Our study asserted that interest groups in particular settings produce discourses that reflect their interests and that discursive struggles lie at the heart of the power struggles that are to be found in every organisation and are particularly evident in periods of flux. The importance of external and contextual factors is that they structure the power relations between internal interest groups, and shape the outcome of the power struggles between them. By applying our theoretical framework to various areas of decision-making and to the policy process,⁹⁵ we were able to demonstrate that the struggle for control between the interest groups represented in the discourse matrix had profound implications for procedural fairness as well as substantive justice. In addition, we identified a new form of managerial discourse that, at the end of our research, had assumed a position of dominance in Scottish penal policy.⁹⁶

The Assessment of Special Educational Needs in England and Scotland

The assessment of special educational needs is a very complex process that can be divided into a number of discrete and overlapping stages and involves inputs from a large number of individuals including educational psychologists, education officers, head teachers, class teachers, medical practitioners, social workers, ‘named persons’, parents and children. In England, this process is structured by a statutory Code of Guidance⁹⁷ and in Scotland by a non-statutory Manual of Good Practice.⁹⁸ The outcomes of the assessment process are extremely significant for those involved, in particular for children and their parents, since they have a direct interest in the type of education the child receives and the resources that are made available for this purpose. However, as with many decentralised decision-making processes, there are

wide variations in outcomes between and among (local) educational authorities in England and Scotland.⁹⁹ Although the Code of Guidance and, to a lesser extent, the Manual of Good Practice have undoubtedly led to a degree of standardisation, there are also wide variations between authorities in the procedures used to assess special educational needs in both countries.

The research conducted with Sheila Riddell, Enid Mordaunt and Alastair Wilson involved an empirical study of the fairness of the different procedures for assessing special educational needs in England and Scotland.¹⁰⁰ Its aims were to describe the range of practices that constitute statutory assessment in England and in Scotland and to analyse the nature of the justice inherent in them. Documentary analysis was supplemented by interviews with key informants including politicians, civil servants, and representatives of professional organisations, voluntary organisations and pressure groups. A postal survey was administered to (local) education authorities in England and Scotland to elucidate variations in the ways in which children are assessed, 'statemented' (in England) or 'recorded' (in Scotland), and the outcomes of these procedures were investigated through a secondary analysis of official statistics. However, the main thrust of the research comprised a more detailed exploration of assessment at the local level. We examined the roles of key players, the extent to which parental preferences were congruent with professional identifications of need and official determinations of policy, and the ways in which outcomes were negotiated. The postal survey of (local) education authorities in England and Scotland enabled us to identify variations in process north and south of the border and provided a basis for selecting four contrasting (local) education authorities (two in England and two in Scotland) for in-depth fieldwork. In each of these authorities, 16 case study pupils with a range of special needs have been selected. The sample of 64 children included cases where parents and professionals agreed about the child's placement and where they did not. Case papers for these children were studied, meetings observed and interviews conducted with most of the key actors (i.e. educational psychologists, education officers, head teachers, SENCOs,¹⁰¹ class teachers, medical practitioners, social workers, 'named persons', parents and, where

appropriate, children).

Our analysis of official policy documents indicated that professionalism, supported by bureaucracy, was still the dominant model of administrative justice in Scotland. The legal and consumerist models were present but were very weak. In England, professional and bureaucratic models were both important, but were more effectively challenged by the legal and consumerist models than was the case in Scotland. This is because the Code of Practice has imposed legally enforceable obligations on local authorities and the establishment of the SENT has made it much easier for parents to challenge the terms of the Statement of Needs and the nominated school appeal, while Parent Partnership Officers encourage parental participation in decision making. Managerialism, evident in the use of performance indicators, and markets, evident in the fact that parents could choose between different types of school, were both stronger in England than in Scotland.

Findings from the postal survey confirmed that, although professionalism and bureaucracy were important in both countries, the bureaucratic model was stronger in England than in Scotland and the professional model was more in evidence in Scotland than in England. Thus educational psychologists were the key players in Scotland while education officers were more influential in England. It also indicated that the legal model was more evidence in England than in Scotland with more parents making use of the available means of legal redress. This issue was explored in the case studies of four authorities and 60 families.

The key informant data also provided strong support for the bureaucratic and professional models. However, many informants also referred to the legal model. This was characterised in terms of parents using redress mechanisms to challenge local authority decisions and the extent to which the procedures operated by local authorities were regulated by central government. Informants indicated that the professional model was the dominant model in Scotland and that the bureaucratic and legal models were both more influential in England. Although local authorities in

England were more tightly controlled by the Code of Practice than their counterparts in Scotland, the greater incursion of market forces in England compared to Scotland has led to greater diversity of provision at local level south of the border.

Local authority and family case study data also revealed the greater emphasis in England on the development of forms of procedural fairness geared to the involvement of parents. Models of procedural fairness based on legality, consumerism and markets acted, in various ways, to tilt the balance of power in England more towards parents. Moreover, by constraining bureaucracy and professionalism, managerialism has clearly had a similar effect. On the other hand, the continued dominance of bureaucracy and professionalism in Scotland has kept the balance of power in the hands of local authorities. But, although there were greater opportunities in England for parents to exert a significant degree of control, those experiencing poverty and social disadvantage were unable to do so and their position was very similar to that of their Scottish counterparts.

One of the main differences between Scotland and England that were revealed by the research was that more of the normative models of administrative justice were evident in England than in Scotland. Because of this, the assessment and statementing of children with special educational needs in England reflects a richer and more multi-dimensional conception of procedural fairness than the assessment and recording of children with special educational needs in Scotland. The two dominant models of decision making, i.e. the professional model, associated with educational psychologists, and the bureaucratic model, associated with education officers, both reflect *top-down* models of decision making and are much less effectively challenged in Scotland than they are in England by any of the *bottom-up* approaches exemplified by the legal and consumerist models which reflect the interests and concerns of parents and children.

In considering the possibility of alternative trade-offs, it is evident that Scotland might learn from England in shifting the balance of power towards parents and children. For

example, a more robust appeals system could be adopted, Records of Needs could specify resources to be provided, assessment procedures, including time-scales, could be tightened, advocacy systems could be strengthened and public access to information improved. However, England might also learn from Scotland that there are dangers with this strategy, not least that it may result in a less consistent, and thus less equitable, set of outcomes than are currently achieved.

The Computerisation of Social Security in 13 Countries

In the course of a comparative study of the use of computers in social security in 13 countries – ten European countries, Australia, Canada and the USA – Paul Henman and I have investigated the impact of computerisation on competing models of administrative justice.¹⁰² Data were collected from two expert informants in each country by means of electronic mail. We thought that there would be many advantages to this procedure – that it would constitute an efficient method of data collection and an effective means of understanding the detailed operation of policies and procedures in different countries; that it would reduce the danger of misunderstanding the situation in a particular country; overcome language barriers; and provide a useful source of informed advice on research design and the interpretation and analysis of the information provided. In the event, perhaps because of the rather specialised nature of the research, it was remarkably difficult to find individuals who were sufficiently well informed and well disposed to act as expert informants, and the amount of feedback we received was quite limited.

Informants completed a structured questionnaire. Where the responses were unclear or incomplete or where further questions arose, informants were sometimes asked to provide supplementary information. Preliminary findings and working papers were distributed electronically and informants were invited to correct and comment on them. In this way, we hope to obtain valuable feedback and to check the accuracy of our findings and the validity of our conclusions. Thus, the conclusions we reach will emerge through consultation and dialogue. In addition, the project will enable us to

explore the potential of e-mail as a research tool.

The study set out to assess the impact of computerisation on administrative justice in a systematic manner. Two indicators have been selected for each of the six models included in Figure 3 and respondents were asked to rate them on a 1-5 scale (where 1 = generally very important; 2 = generally important; 3 = important in some areas; 4 = not very important; 5 = unimportant). They were then asked whether computerisation had made each of them more or less important. A 1-5 scale was used here too (where 1 = greatly increased importance; 2 = increased importance; 3 = much the same; 4 = decreased importance; 5 = greatly decreased importance). The scores for the two expert informants from each country were averaged but, where the two informants gave very different responses to the same question, attempts were made to resolve their disagreements and reach a consensus.

Figure 7: A Framework for Assessing the Impact of Computerisation on Procedural Fairness in Social Security

Indicator	Model	Importance Rating (on 1-5 scale)	Impact Rating (on 1-5 scale)
In making decisions about entitlement to benefit, social security institutions apply well-established rules	bureaucracy		
Dissatisfied customers can complain to a professional body	professionalism		
The government purchases social security services from non-governmental service providers	markets		
Social security institutions are expected to meet performance targets	managerialism		
Social security institutions are expected to abide by customer charters	consumerism		
Claimants can check and correct personal records	legality		
Dissatisfied customers have their cases reviewed internally	bureaucracy		
Indicators are used to assess staff performance	managerialism		
In making decisions to benefit entitlement, staff exercise administrative discretion	professionalism		
Claimants can choose between more than one social security institutions	markets		
Claimants participate actively in decision making	consumerism		
Dissatisfied customers appeal to an independent court or tribunal	legality		

The use of two expert informants for each country was intended to provide a check on the accuracy of the data generated by the study. Nevertheless, doubts concerning its validity and reliability can still be raised. However, preliminary results, from 10 of the 12 countries in the study,¹⁰³ indicate that, with one exception, bureaucracy is still the dominant model of administrative justice in social security in the countries

included in the study, and computerisation appears to have reinforced its dominance. Computerisation also appears to have had a very significant effect in promoting the managerial model of administrative justice, which in many countries is now the second most important model. In contrast to this, there is little evidence of the professional model and computerisation appears to have reduced its importance. There is also little evidence that the market model has had much of an impact although it does appear to have been strengthened somewhat by computerisation – the two exceptions here are Belgium and Finland where employers and employees can choose which social security fund should provide statutorily-defined social security benefits. As far as the legal model of administrative justice is concerned, appeal procedures are generally available but few claimants are able to access and correct their records. Neither of these indicators of the legal model appears to have been much affected by computerisation. Finally, the importance of consumerism differs from country to country and computerisation has had a mixed response on it.

Among these broad shifts, computerisation does appear to have had some effect on the procedures for determining entitlement to benefit. In particular, the assessment of entitlement has become increasingly automated, involving an increased reliance on rules and correspondingly decreased use of discretion. This has been supported by an increased reliance on a managerial model, in particular on performance measures, to bring about improvements in the delivery of social security benefits. However, there is little evidence that this ‘top-down’ type of accountability is being matched by an increased emphasis on the legal and consumerist models of administrative justice which embody ‘bottom up’ approaches.

The study indicates that computerisation alters the ways in which decisions are made, the ways in which they can be challenged, and the ways in which individuals are treated by social security institutions. It follows that it has had an impact on the trade-offs that are made between the six different models of administrative justice outlined above. However, it did not have the same effect on procedural fairness in each of the ten countries in our study. We investigated whether the aims of

computerisation were shaped by the socio-political values associated with different 'welfare state regimes',¹⁰⁴ different types of capitalism¹⁰⁵ and different structures of public administration,¹⁰⁶ and found some evidence to suggest that they are shaped by the socio-political values associated with different types of welfare state.¹⁰⁷ However, the data do not indicate that the impact of computerisation on procedural fairness is patterned in the same way.

Conclusions

Each of the studies described above has sought to study and give meaning to administrative justice using the relativistic approach outlined in Part 3 above. In two of the studies (the study of decision-making in the Scottish prison system and the ongoing study of the assessment of special educational needs in England and Scotland), this was the over-riding aim, while in the other two (the two studies of computerisation in social security), it was ancillary to their main aims. The studies adopt a wide range of methodologies ranging from the use of expert informants in the two studies of computerisation to documentary analysis, interviewing and observation in the other two studies. Each has its strengths and weaknesses. In terms of the framework for analysing administrative justice, the attempt to assess the impact of the *Operational Strategy* in terms of the three normative models identified by Mashaw was undoubtedly the simplest. By contrast, the study of decision-making in the Scottish prison system was probably the most ambitious. With its focus on the discourses of procedural fairness and substantive justice and on the discursive struggles between the individuals and groups that embodied these discourses, it was able to give a dynamic account of the dramatic changes that were taking place in the Scottish prison system at the time. Although this study anticipated the rise of managerialism as another normative model of administrative justice, it was only in the later studies that this was fully elaborated. Our study of the assessment of special educational needs in England and Scotland utilised an extended framework based on six normative models of administrative justice which yielded a rich account of the different forms that administrative justice can take, and the different responses to

them of each of the parties concerned. It also indicated how administrative justice can be enhanced in each case by means of a different trade-off between the competing models. This extended framework was more systematically investigated in our study of computerisation in the social security systems in different countries which sought to establish its impact on the trade-offs between the different normative models of administrative justice. However, in this case, the advantages of a systematic approach were inevitably offset by concerns about the reliability and validity of the data. Although all of the studies have their limitations, it is contended that, considered together, they demonstrate the power of this method of studying procedural fairness and the validity of the assumptions that underlie it.

5: THE SOCIO-LEGAL PARADIGM

Four Quadrants of Jurisprudence

Neil MacCormick¹⁰⁸ claims that there are four key modes of legal scholarship which comprise what he calls ‘raw law’, ‘doctrinal law’, ‘law in social science’ and ‘fundamental values and principles’. In Figure 8, these four modes of thought are mapped onto a space divided into four quadrants.

Figure 8: The Four Quadrants of Jurisprudence

QUADRANT 1 Raw Law (Law in Action)	QUADRANT 2 Doctrinal Law (‘Black-letter’ Law)
QUADRANT 3 Law in Social Science (Socio-legal Studies)	QUADRANT 4 Fundamental Values and Principles (Legal, Political and Social Philosophy)

Raw Law (quadrant 1) refers to the practice of law and is defined in terms of activities. It comprises, on the one hand what solicitors do for their clients, advocates (and barristers) argue before the courts and judges do when they determine the outcome of cases and, on the other hand, what legislative draftsmen draft, parliaments

legislate and officials implement. However, it also includes what ordinary citizens do when they perform their legal duties, e.g. by filling in their tax forms or paying their mortgage or their rent, or when they exercise their legal rights, e.g. by suing for breach of contract or appealing against an administrative decision. Thus, it covers what lawyers, legislators, officials and citizens actually do when they invoke the law.

Doctrinal Law (quadrant 2) attempts to make sense of decisions that are imputable to raw law by analysing them *from the inside*. It is sub-divided into a number of categories, e.g. civil law and criminal law, public law and private law, constitutional law, administrative law, tax law, social security law etc. It is carried out by judges (in the course of justifying their decisions) and legislators (in the course of formulating legislation), and by the majority of law teachers and law students who engage critically, albeit within the legal paradigm, with judicial opinions and with legislation. It refers to the elucidation of the logic underlying legal decisions, to the search for legal rules and principles, and their application to particular cases, to the formulation of case law and the promulgation and interpretation of statute law. The legal rules and principles in question should, as far as possible, be both mutually consistent and normatively coherent.

Law in Social Science (quadrant 3) involves analysing 'the law', which comprises doctrinal law (quadrant 2) as well as raw law (quadrant 1) and also includes legal institutions, from the perspective of the social sciences. In contrast to doctrinal law, examining the law from this perspective involves analysing it *from the outside*, i.e. from some external point of reference. Different external points of reference are provided by the various social sciences. Whether they attempt to account for the law in terms of economic rationality, class conflict, political power, social control or some other principle, they all invoke a broader and more general explanatory framework and focus on the relationship between law and society. Law in Social Science embraces the contributions of social theorists and of empirical social researchers.

Fundamental Values and Principles (quadrant 4) refers to legal, political and social

philosophy which are concerned with, *inter alia*, the critical elaboration of theories of rights, principles of justice and conceptions of social welfare. Although none of the other quadrants can be said to be value free, this quadrant is quintessentially the domain of values. It embraces jurisprudence and legal theory. There is much controversy about the relationship between this perspective and the others.

Natural lawyers regard law as being intrinsically linked to morality, arguing that human laws derive their authority from natural (or divine) law. In the classical accounts of natural law, associated with Catholic thinkers like St. Thomas Aquinas, a law of nature has characteristics quite different from the ordinary laws with which we are familiar – it is a higher law (most frequently divine law), it is universal and immutable and it is discoverable by reason. This conception of law has been the subject of much criticism but modern natural law theorists, such as John Finnis¹⁰⁹ have responded to these critics by starting out from a reflective, i.e. subjective, grasp of what is self-evidently good for people rather from supposedly objective or given statements about human nature.

Legal positivists, on the other hand, assert that there is no relationship between law and morality. They assert that all law is 'positive law' and deny that there is any such thing as 'natural law'. What constitutes law is one thing, its goodness or badness another, and it is what constitutes law that counts. According to John Austin,¹¹⁰ 'law properly so called', or positive law, comprises the generalisable commands of the sovereign or his subordinates that can be enforced in the courts; according to H. L. A. Hart,¹¹¹ it is a system of rules comprising primary (obligation) rules and secondary (power conferring) rules. However, Ronald Dworkin¹¹² has argued that law cannot be defined solely in terms of primary and secondary rules and that it also contains principles. Judges elucidate these principles by deciding, in 'hard cases', which outcome would be most consistent, not only with the statutes and precedents which have a bearing on the case but also with the institutions supported by the community and its political morality. Thus, in this respect, *institutional theorists*, like Dworkin, are on the same side as the natural lawyers in arguing that there is a relationship

between law and morality.

Law in Social Science

During the 1970s, there was a vigorous debate between advocates of the sociology of law and advocates of socio-legal studies about how the law (and legal institutions) should be analysed from the perspective of the social sciences.¹¹³ Those who championed the sociology of law¹¹⁴ argued that it was concerned with knowledge for its own sake. They adopted a critical stance to law, legal institutions and the legal system, most of their work was 'theoretical' and their main concern was to promote a wider understanding of the nature of legal order and the relationship between law and society. By contrast, those who championed socio-legal studies¹¹⁵ adopted a more instrumental approach to knowledge – they tended to accept law, legal institutions and the legal system as given, most of their work was 'empirical' and their main concern was to contribute to legal reform. Today such disputes are much more muted and the demarcation lines much harder to identify. This is partly because sociologists of law have embraced empirical research while socio-legal researchers have developed a greater interest in theory.¹¹⁶ Socio-legal research is now very multidisciplinary and sociology represents only one disciplinary orientation within the wider enterprise. Writing in 1983, Harris referred to the contributions from economics, psychology, social history, anthropology, and political science¹¹⁷ and could also have acknowledged those from social policy¹¹⁸ and from feminism.¹¹⁹

Differences between 'Black Letter Law' and Socio-Legal Studies

As noted above, one difference between doctrinal law (often referred to as 'black letter law') and law in social science (or socio-legal studies) is that the former adopts an *internal* perspective while the latter adopts an *external* perspective. While the 'black letter' approach analyses the law in terms of legal concepts and categories, the socio-legal approach analyses the law as a social institution in terms of concepts and categories that are derived from the social sciences.¹²⁰ A second difference is that the

black-letter approach tends to focus on 'leading' cases, i.e. on those exceptional cases which find their way to the superior courts, since it is these cases which (in our common law system) create precedents; while the socio-legal approach tends to focus on routine cases, since these have the greatest significance for those who are subject to them.¹²¹ Thus, while 'black letter' lawyers use legal argumentation to identify the operative rules and principles, socio-legal researchers invoke the social sciences to analyse how the law has evolved, how ordinary citizens, lawyers and officials use the law and legal institutions, and the impact of law on society.

The Normative Character of Socio-Legal Studies

Since what counts as a 'fact' only does so in the context of some explanatory scheme or theoretical framework, it would be a mistake to think of raw law (quadrant 1) as something separate from doctrinal law (quadrant 2). Thus, the categories that are used to comprehend 'raw law' are actually generated by doctrinal law. Likewise, since law is inherently normative, the understanding of law derived from the social sciences (quadrant 3) is incomplete unless carried out in conjunction with an analysis of values and principles (quadrant 4). Social policy is likewise normative and the same argument applies there. What, in my view, makes socio-legal studies (in respect of the law) – and social policy (in respect of the making and implementation of policy) – distinctive is the fact that, in both cases, social research is (or ought to be) linked to philosophical analysis, in particular to the concerns of social, political and legal philosophy.¹²²

Conclusions

The approach to administrative justice that is embodied in the research I have undertaken would appear to satisfy each of the three defining characteristics of the socio-legal paradigm. It has adopted an external perspective to legal process, which seeks to analyse administrative justice in terms of concepts and categories that are derived from the social sciences; it has focused on routine, rather than leading, cases;

and it has been informed by philosophical analysis. Thus, it can be described, with some confidence, as a socio-legal approach. Whether or not it has been successful in throwing light on some rather neglected features of public administration is for others to judge.

Ibid., p. 19.

Galle, W. B. (1944), *Public Administration: A Practical Approach*, New York: McGraw-Hill.

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I am indebted to David G. Richardson for his help in the preparation of this paper.

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Ibid., pp. 52-53.

Ibid., pp. 85-86.

Irving Barry argues that the development of public administration is not a linear process but an accident, which is a result of a series of events, which are not predictable. He argues that the development of public administration is a result of a series of events, which are not predictable. He argues that the development of public administration is a result of a series of events, which are not predictable.

Ibid., p. 201.

Galbraith, J. (1970), *The Public Administration: A Practical Approach*, New York: McGraw-Hill.

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Hayes, M. (1970), *The Public Administration: A Practical Approach*, New York: McGraw-Hill.

Ibid., pp. 110-111.

Ibid., pp. 143-144.

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2. *Ibid.*, p. 20.
3. Rawls, J. (1972), *A Theory of Justice*, Oxford: Clarendon Press, p. 3.
4. *Ibid.*, p. 10.
5. Gallie, W. B. (1964), 'Essentially Contested Concepts' in *Philosophy and Historical Understanding*, London: Chatto and Windus.
6. Honoré, A. M. (1970), 'Social Justice' in R. S. Summers (ed.) *Essays in Legal Philosophy*, Oxford: Basil Blackwell, pp. 61-94.
7. Richardson, G. (1984), 'The Legal Regulation of Process', in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action*, Oxford: Clarendon Press, p. 105.
8. I am indebted to Zenon Bankowski for pointing this out to me.
9. Richardson, G., *op. cit.*, p. 111.
10. *Ibid.*
11. Dworkin, R. M. (1986), *A Matter of Principle*, Oxford: Clarendon Press, p. 80.
12. *Ibid.*, pp. 92-93.
13. *Ibid.*, pp. 85-86.
14. Brian Barry argues that the dovetailing of fair procedures and just outcomes is an accident, which is attributable to the fact that procedures are usually selected with an eye to such dovetailing, and that there is no analytic connection between fair procedures and just outcomes. See Barry, B. M. (1965), *Political Argument*, London: Routledge and Kegan Paul.
15. *Ibid.*, p. 201.
16. Galligan, D. (1996), *Due Process and Fair Procedures*, Oxford: Clarendon Press, p.6.
17. *Ibid.*, p. 54.
18. *Ibid.*
19. See, for example, Tribe, L. (1988), *American Constitutional Law* (2nd edition), New York: Foundation Press, p. 666.
20. Bayles, M. (1990), *Procedural Justice: Allocating to Individuals*, Dordrecht, Boston and London: Kluwer Academic Publishers, p. 11.
21. *Ibid.*, pp. 115-139.
22. *Ibid.*, pp. 163-189.
23. Thibaut, J. and Walker, L. (1975), *Procedural Justice: a Psychological Analysis*, Hillsdale, New Jersey: Laurence Erlbaum Associates.
24. Leventhal, G. S. (1980), 'What Should be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships' in K. J. Gergen,

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- M. S. Greenberg and R. H. Willis (eds.), *Social Exchange: Advances in Theory and Research*, New York and London: Plenum Press, pp. 27-55.
25. Lind, E. A. and Tyler, T. R. (1988), *The Social Psychology of Procedural Justice*, New York and London, Plenum Press, pp. 133-135.
26. Tyler, T. (1988), 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures', *Law and Society Review*, 22 (1), pp. 103-135.
27. *Ibid.*, pp. 105.
28. *Ibid.*, pp. 128.
29. Galligan, D., *op. cit.*, p. 93.
30. *Ibid.*, p. 94.
31. Lind, E. A. and Tyler, T. R., *op. cit.*, p. 29.
32. *Ibid.*, pp. 39-40.
33. *Ibid.*, p. 92.
34. *Ibid.*, p. 213.
35. As Rothstein points out, if the implementation of a policy is regarded as unfair, it will undermine the legitimacy of the policy in question. See Rothstein, B. (1999), *Just Institutions*, Cambridge: Cambridge University Press, p.3.
36. Harlow, C. and Rawlings, R. (1997), *Law and Administration* (Second Edition), London, Edinburgh and Dublin: Butterworths, p. 495.
37. Fuller, L. (1978), 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92, p. 353.
38. Harlow, C. and Rawlings, R., *op. cit.*, p. 496. The rule against bias asserts that decisions must be made by an impartial judge and may be set aside where there are grounds for reasonable suspicion of bias; the right to a hearing that each party should have the opportunity of knowing the case against him (or her) and stating his (or her) own case.
39. *Ibid.*, p. 32.
40. *Ibid.*, p. 499. For a full account of 'red light' and 'green light' theories, see Harlow and Rawlings, *op. cit.*, chapters 2 and 3 (pp. 29-66 and 67-90).
41. Mullan, D. (1975), 'Fairness: the New Natural Justice', *University of Toronto Law Journal*, 25, p. 281, cited in Harlow, C. and Rawlings, R., *op. cit.*, p. 504.
42. Harlow, C. and Rawlings, R., *op. cit.*, p. 510.
43. *Ibid.*, p. 516.
44. *Report of the Franks Committee on Tribunals and Enquiries* (1957), Cmnd. 218, London: HMSO.
45. *Ibid.*, para. 42.
46. Harlow, C. and Rawlings, R., *op. cit.*, p. 471.

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47. For a general discussion of the impact of judicial decisions on public administration, which highlights the lack of empirical evidence, see Richardson, G. and Sunkin, M. (1996), 'Judicial Review: Questions of Impact', *Public Law*, pp. 79-103. Two recent discussions that are based on empirical evidence are Mullen, T., Pick, K. and Prosser, T. (1996), *Judicial Review in Scotland*, Chichester: John Wiley and Sons, pp. 113-134 and Halliday, S. (2000), 'The Influence of Judicial Review on Bureaucratic Decision Making', *Public Law*, pp. 110-122.
 48. See Halliday (2001), 'Ideal Conditions of Impact: Some Reflections on the Influence of Judicial review on Administrative Decision Making', paper presented to the Law Program, Research School of Social Sciences, Australian National University, Canberra, 5th September.
 49. Baldwin, J., Wikeley, N. and Young, R. (1992), *Judging Social Security: The Adjudication of Claims for Benefit in Britain*, Oxford: Clarendon Press.
 50. The tribunals referred to here are first-tier tribunals and the Social Security Commissioners, which are a second-tier tribunal, had a greater impact on first-instance decision makers.
 51. *HC Deb.*, 18 October 1966, col. 51 (R. H. S. Crossman, MP).
 52. *Annual Report of the Council on Tribunals* (1993), HC 290, para 7.
 53. It is, of course, possible for maladministration to occur without the complainant suffering any injustice. In such a case, the complainant would not be entitled to any redress.
 54. See, for example, Harlow, C. and Rawlings, R., *op. cit.*, pp. 398-401.
 55. Remedial action involves correcting the injustice caused by the maladministration and reversing the decision made because of it; compensation can cover direct and indirect losses resulting from maladministration; and an apology would normally come from the head of the organisation complained of. Note that remedial action is not always feasible while compensation may be appropriate when remedial action is not. However, where the losses caused by maladministration are psychological rather than material, it may be difficult to put a monetary value on them. Sometimes an apology may be sufficient to satisfy the complainant.
 56. Himsworth, C. M. G. (ed.) (1984), *Judicial Teeth for Local Ombudsmen?* Department of Public Law, University of Edinburgh.
 57. Mashaw, J. L. (1974), 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims', *Cornell Law Review*, 59, pp. 772-824.
 58. Mashaw, J. L. (1983), *Bureaucratic Justice: Managing Social Security Disability Claims*, New Haven and London: Yale University Press, p.15.
 59. *Ibid.*, pp. 21-22.
 60. *Ibid.*, p. 24.

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61. *Ibid.*, p. 31.
 62. Note that the third model is characterised in terms of legality rather than fairness. For a discussion of legality, which is a synonym for 'the rule of law', see Selznick, P. (1980), *Law, Society and Industrial Justice*, New Brunswick and London: Transaction Books, especially pp. 11-18.
 63. Mashaw, *op. cit.*, p. 23.
 64. Walzer, M. (1983), *Spheres of Justice*, Oxford: Basil Blackwell.
 65. *Ibid.*, p.6.
 66. *Ibid.*, pp. 8-9. Agreement on the principle of justice which should determine how the goods in question should be distributed may not be the end of the matter since there may be considerable disagreement about how to operationalise the principle in question. See Elster, J. (1992), *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens*, Cambridge: Cambridge University Press.
 67. Lipsky, M. (1980), *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.
 68. Disability policies are a good example. For an account of recent developments in several European countries, see van Oorschot, W. and Hvinden, B. (eds.) (2000), 'Disability Policies in European Countries' (Special Issue), *European Journal of Social Security*, 2 (4).
 69. See Bayles, *op. cit.*, pp. 163-189 and Galligan, D., *op. cit.*, p. 25.
 70. Hood, C. (1991), 'A New Public Management for all Seasons', *Public Administration*, 69, Spring, pp. 3-19 and Hood, C. (1998), *The Art of the State: Culture, Rhetoric and Public Management*, Oxford: Clarendon Press.
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 72. Johnson, N. (ed.) (1995), *Private Markets in Health and Welfare: an International Perspective*, Oxford and Providence, RI: Berg.
 73. See, for example, the reviews of Mashaw (1983) by Boyer, B. (1984) in *Michigan Law Review*, 82, pp. 971-980 and Maranville, D. (1984) in *Minnesota Law Review*, 69, pp. 325-347.
 74. Adler, M. and Longhurst, B. (1994), *Discourse, Power and Justice: Towards a New Sociology of Imprisonment*, London: Routledge.
 75. Galligan, *op. cit.*, pp. 229-240.
 76. Instead of depicting managerialism, consumerism and the market as separate models of administrative justice, they may be construed as components of a single managerial model. I am indebted to Richard Kerley for pointing this out to me.
 77. See note 61 above.
 78. Clarke, J. and Newman, J., *op. cit.*, chapter 6
 79. Potter, C. (1994), 'The Citizen's Charter: a Preliminary Analysis', *Public*

80. Hirschman, A. O. (1970), *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States*, Cambridge, MA: Harvard University Press.
81. *Ibid.*
82. Le Grand, J. (1991), 'Quasi Markets in Social Policy', *Economic Journal*, 101, September, pp.1256-1267 and J. Le Grand and W. Bartlett (eds.) (1993), *Quasi Markets and Social Policy*, Basingstoke: Macmillan.
83. For an illuminating discussion of the ethics of markets, see Sen, A. (1985), 'The Moral Standing of the Market' in E. F. Paul, J. Paul and F. D. Miller, Jr. (eds.), *Ethics and Economics*, Oxford: Basil Blackwell.
84. Unless it is argued that the initial distribution of resources accurately reflects pre-existing property rights or that the final distribution reflects the producers' right to enjoy what they produce. The best account of the argument based on prior entitlements can be found in Nozick, R. (1974), *Anarchy, State and Utopia*, Oxford: Basil Blackwell, and of the argument based on producers' rights in Bauer, P. T. (1981), *Equality, The Third World and Economic Delusion*, Cambridge, MA.: Harvard University Press. Both arguments are very effectively criticised in Sen, *op. cit.*
85. See Part 1 and note 12 above.
86. Some followers of Mashaw, e.g. Roy Sainsbury, have attempted to develop a less relativistic conception of 'administrative justice'. Adopting the perspective of the individual citizen, he argues that administrative justice, defined as those 'qualities an administrative decision ought to exhibit, which provide arguments for the acceptability of its decisions', has two invariant components. These are, first, accuracy and, second, fairness, the latter comprising promptness, impartiality, participation and accountability. See Sainsbury, R. (1992), 'Administrative Justice: Discretion and Procedure in Social Security Decision-Making' in K. Hawkins (ed.), *The Uses of Discretion*, Oxford: Clarendon Press. According to Jürgen Habermas, participation is a means of advancing rational discourse and, as such, plays an important role in legitimating the rule of law and the role of the state. For a fuller discussion, see Habermas, J. (1992), *Between Facts and Norms*, Cambridge: Polity Press.
87. See the discussion of Rawls in the section on 'The Meaning of Justice' in Part 1 above.
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92. Adler, M. and Longhurst, B., *op. cit.*
93. These included the initial allocation of prisoners to establishments, transfers between establishments, security categorisations, the allocation of work and educational placements, the distribution of privileges, the handling of requests and grievances, appeals to the domestic courts, the PCA and the ECHR, and the activities of the Prisons Inspectorate.
94. Rawls, J., *op. cit.*, pp. 46-53.
95. See, also Adler, M. and Longhurst, B. (1990), 'The Future of Imprisonment in Scotland: a Critique of Policy', in A. Brown and R. Parry (eds.), *The Scottish Government Yearbook 1990*, Edinburgh: Unit for the Study of Government in Scotland, University of Edinburgh, 1990, pp. 226-242; Adler, M. and Longhurst, B. (1991), 'The Future of Imprisonment in Scotland: a Great Leap Forward?' in A. Brown and D. McCrone (eds.), *The Scottish Government Yearbook 1991*, Edinburgh: Unit for the Study of Government in Scotland, University of Edinburgh, 1991, pp. 209-216; and Adler, M. and Longhurst, B. (1992), 'The Future of Imprisonment in Scotland' in J. Muncie and R. Sparks (eds.), *Imprisonment: European Perspectives*, Hemel Hempstead: Harvester Wheatsheaf, 1992, pp. 166-176.
96. Adler, M. and Longhurst, B., *op. cit.*, pp. 236-238.
97. Department for Education (1994), *Code of Practice on the Identification and Assessment of Special Educational Needs*, London: HMSO. In 1999, the Government circulated a number of proposals in a consultation document that is intended to lead to a revised code which will come into effect in the school year 2000-2001.
98. Scottish Office Education and Industry Department (1998), *A Manual of Good Practice in Special Educational Needs*, Edinburgh: HMSO.
99. The percentage of pupils who are statemented in England (2.9%) is higher than the percentage of pupils who are recorded in Scotland (1.9%) but there are wide variations between authorities in both countries. Among pupils who are statemented or recorded, a higher proportion attend mainstream schools in England (58%) than in Scotland (37%). In Scotland, some special school pupils do not have records of needs although all special school pupils in England are statemented. In spite of this, the percentage of the age group who attend special schools is higher in England (1.2%) than in Scotland

- (1.0%). The figures relate to the years 1996, 1997 or 1998 and the comparisons are therefore not strictly correct.
100. The research on 'The Justice Inherent in the Assessment of Special Educational Needs in England and Scotland' (grant number R000237768) was funded by the ESRC.
 101. In England, Special Educational Needs Co-ordinators (SENCOs) implement the school-based stages of assessment and co-ordinate reviews for all children with special educational needs.
 102. The costs of this study were met by a grant from IBM (UK) Ltd.
 103. Adler, M. and Henman, P. (2001), 'e-Justice: a Comparative Study of Computerisation and Procedural Justice in Social Security', *International Review of Law, Computers and Technology*, 15(2), pp. 195-212.
 104. We used a recent modification of Gøsta Esping-Andersen's well-known typology (see Esping-Andersen, G. (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press) because it covers more countries than the original formulation and does so with fewer ambiguities. This distinguishes between 'residual' welfare states found in English-speaking countries, 'Christian Democratic' welfare states found in Continental Europe and 'Social Democratic' welfare state regimes found in Scandinavia. See Kitschelt, H., Lange, P., Marks, G. and Stephens, J. D. (1999) 'Convergence and Divergence in Advanced Capitalist Democracies' in H. Kitschelt, P. Lange, G. Marks and J. D. Stephens (eds.), *Continuity and Change in Contemporary Capitalism*. Cambridge: Cambridge University Press, pp. 427-460, esp. Table 15.3.
 105. We distinguished between 'co-ordinated' and 'unco-ordinated' market economies. See Soskice, D. (1999) 'Divergent Production Regimes: Co-ordinated and Unco-ordinated Market Economies in the 1980s and 1990s' in H. Kitschelt, P. Lange, G. Marks and J. D. Stephens (eds.) (1999), *Continuity and Change in Contemporary Capitalism*, Cambridge, Cambridge University Press, pp. 101-134.
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 110. Austin, J. (1954, edited by H. L. A. Hart), *The Province of Jurisprudence Determined*, London: Weidenfeld and Nicolson.
 111. Hart, H. L. A. (1961), *The Concept of Law*, Oxford: Clarendon Press.

112. See, in particular, Dworkin, R. M. (1986), *Law's Empire*, London: Fontana.
113. For an account of this debate, see Thomas, P. A. (1995), 'Socio-Legal Studies in the United Kingdom' in *Festschrift for Professor Toon Pieters*, Antwerp: Gouda Quint, pp. 229-246.
114. See, for example, Campbell, C. M. and Wiles, P. (1976), 'The Study of Law and Society in Britain', *Law and Society Review*, 10, pp. 547-578.
115. See, for example, MacCormick, D. N. (1977), 'Challenging Sociological Definitions', *British Journal of Law and Society*, 4 (1), pp. 87-95.
116. Cotterrell, R. (1990), 'Sociology of Law in Britain: Its Development and Present Prospects' in V. Ferrari (ed.), *Developing Sociology of Law: A World-Wide Documentary Enquiry*, Milan: Giuffrè, pp. 779-803. According to Cotterrell, the rapprochement between the sociology of law and socio-legal studies dates from the early 1980s.
117. Harris, D. (1983), 'The Development of Socio-Legal Studies in the United Kingdom', *Legal Studies*, 3, pp. 315-333.
118. See Hillyard, P. (1993), 'Some Reflections on Socio-Legal Studies', *unpublished paper prepared for the ESRC Review of Socio-Legal Studies*, who argues that social policy is the social science discipline which is closest to socio-legal studies.
119. See Lacey, N. (1993), 'Conceiving Socio-Legal Studies', *unpublished paper prepared for the ESRC Review of Socio-Legal Studies*, who describes the impact of feminism on her work in criminal and public law.
120. A similar characterisation of socio-legal studies, together with an account of its development in the UK, its contribution to knowledge, policy and practice, its research base in the universities, and its future prospects can be found in the final report of a review carried out by the ESRC in 1994. See Economic and Social Research Council (1994), *Review of Socio-Legal Studies: Final Report*, Swindon: ESRC.
121. There are, of course, exceptions to this generalisation. See, for example, Alan Paterson's account of how appeals are decided in the House of Lords in Paterson, A. (1982), *The Law Lords*, London and Basingstoke: Macmillan.
122. Hillyard, *op. cit.*, also points to the similarities between socio-legal studies and social policy while Lacey, *op. cit.*, draws attention to the normative aspects of socio-legal scholarship and emphasises the relevance of social and political theory for socio-legal research.

CHAPTER 3

AN ALTERNATIVE APPROACH TO PARENTAL CHOICE*

SUMMARY

1. The evidence from a decade of open enrolment in Scotland suggests that parental choice has led to an inefficient use of resources, widening disparities between schools, increased social segregation and threats to equality of educational opportunity.
2. Although there have been gainers as well as losers, the balance sheet suggests that parental choice has been a 'negative sum game' in which the gains achieved by some pupils have been more than offset by the losses incurred by others and by the community as a whole.
3. It is likely that the outcomes of open enrolment in England will be even more problematic.
4. Recent legislation has not achieved an optimal balance between the rights of parents to choose schools for their children and the responsibilities of government to promote the education of all children.
5. An alternative approach to education policy which takes choice seriously but attempts to avoid the most unacceptable consequences of recent legislation is outlined, the main components of which are as follows:
 - (a) Within limits, schools would be encouraged to develop their own distinctive characteristics.
 - (b) Decisions about school allocation should seek to promote children's interests (rather than parental preferences) and would involve teachers and older pupils as well as parents.

* I am very grateful to my colleagues Andrew McPherson, David Raffe and Doug Willms, and to Josh Hillman for their very helpful comments to an earlier draft of this Briefing.

- (c) Decisions about school allocation would be made for all children (and not just for a minority). Where the number of applicants for a school is greater than the number of available places, priority would be given to those whose cases are most strongly supported.
- (d) Local authorities would be expected to formulate admissions policies for schools. This would provide a measure of protection for schools that lose pupils.

INTRODUCTION

The aims of this Briefing are (i) to outline and compare English and Scottish legislation relating to parental choice, (ii) to review the findings of research on the effects of parental choice in Scotland where legislation was introduced more than ten years ago, (iii) to assess the likely effects of parental choice in England in the light of the 1988 Education Reform Act and subsequent policy developments, and (iv) to put forward an alternative approach to parental choice which takes choice seriously but seeks to avoid some of the most unacceptable consequences of recent legislation.

PARENTAL CHOICE NORTH AND SOUTH OF THE BORDER

The 1944 Education Act and the 1945 Education (Scotland) Act gave local authorities a broad discretion to determine school admissions. This created few problems until the mid-1970s when widespread dissatisfaction with state education and political opposition to the extension of comprehensive schooling prompted the Conservative Party, which was then in Opposition, to champion parental choice. The Conservatives were returned to office in 1979 and soon introduced legislation to this effect, first for England and Wales and, soon afterwards, for Scotland.

The changes brought about by the parental choice provisions in the 1980 Education Act and the 1981 Education (Scotland) Act can be interpreted in a number of ways, for example:

1. As a shift away from an authority-wide approach to school admissions (which enables education authorities to prevent overcrowding and under-enrolment, deploy resources in an efficient manner and pursue their own conception of social justice) towards a parent-centred approach (in which parents decide what is best for their children and parents' concerns have priority over those of the education authorities).
2. More generally, as a shift away from a collective-welfare orientation (which focuses on the achievement of collective ends, is primarily concerned with the overall pattern of decision-making and recognises the necessity for trade-offs between the various ends the policy is trying to achieve) towards an individual-client orientation (which focuses on each individual case, assumes that individuals are capable of deciding and acting for themselves and precludes the possibility of trade-offs).
3. As the first stage of a two-stage deregulation of the educational system which seeks to undermine the role of the local authority and replace bureaucratic and political forms of accountability with market-like relationships between schools and parents. In this two-stage process, the second stage comprises the delegation of powers and responsibilities from education authorities to individual schools and a greater involvement of parents in their management.

Until 1988, deregulation had proceeded further in Scotland than in England and Wales. This is because the parental choice provisions in the 1981 Education (Scotland) Act were considerably stronger than those in the 1980 Education Act and Scottish education authorities had much weaker powers to control school admissions than local education authorities in England and Wales.

The position in England and Wales was completely changed by the provisions of the 1988 Education Reform Act. This strengthened the rights of parents and reduced the powers of local education authorities, introducing a form of 'open enrolment' similar to that which has existed in Scotland since the early 1980s. Local education authorities are now prohibited from imposing their own intake limits and from turning

away pupils unless a statutorily-defined number is exceeded. It also introduced a substantial degree of delegated financial management. Thus, in England and Wales, all secondary schools and most primary schools now receive budgets from the local authority which, subject to meeting their statutory obligations, they are free to spend as they wish. By contrast, local authorities still determine school budgets in Scotland and School Boards only have minor and largely consultative powers.¹

Considering these two sets of developments together, it is clear that demand-side deregulation in England and Wales has caught up with its earlier development in Scotland while supply-side deregulation has been taken a good deal further. The 'uncoupling' of schools from local authorities and the replacement of bureaucratic and political forms of accountability by market-like relationships between parents and schools has been taken a stage further in England and Wales than it has in Scotland. How long this disparity will be allowed to continue is a matter for conjecture but the recent publication of new guidelines for the devolved management of schools in Scotland suggests that the gap is set to close.

THE IMPACT OF PARENTAL CHOICE IN SCOTLAND

Since a form of 'open-enrolment' has existed in Scotland for more than a decade and there have been a number of pieces of research on the implementation and impact of parental choice in Scotland, it is clear that much can be learned from the Scottish experience. The latest available figures indicate that 14.9 per cent of pupils in the first year of primary school and 11.5 per cent of pupils in the first year of secondary school were the subject of a 'placing request' (for an alternative to the designated school).² There were considerable variations between regions with substantially higher rates in the more urban authorities, where a number of schools may be within fairly easy reach, and correspondingly lower rates in the more rural authorities, where geographical considerations effectively preclude a choice of school for most parents. Since 1982/83, the first year in which the legislative provisions were implemented in full, the number of placing requests has increased by about 50 per cent. Although

most of these placing requests were granted, there has been a significant fall in the success rate from 97.8 per cent in 1982/83 to 89.3 per cent in 1990/91 due, mainly, to the closure of school annexes, the removal of temporary accommodation and the imposition of *de facto* intake limits to prevent overcrowding.

About 10 per cent of parents whose requests were turned down appealed to a statutory Education Appeal Committee. These committees, which contain a majority of councillors, can hardly be described as independent and it is not therefore surprising that few appeals are successful at this stage. A very small number of parents made a further appeal to the courts. However, most of these cases have been deserted by education authorities which have preferred conceding to the individual parent to losing the case and having to reconsider those of all the other parents whose requests for the school in question had been turned down. Most of the cases that have actually been heard by the courts have been decided in favour of the parents.

Research carried out between 1983 and 1986 by Adler et al assessed the significance of the parental choice provisions introduced into Scotland by the 1981 Education (Scotland) Act³. The main findings are set out in the panel below.

1. In the cities, the proportion of placing requests was much higher than in the country as a whole. In several cities, it was 20-25 per cent and in some city areas, it was more than 50 per cent. These requests came from right across the social class spectrum. However, although there was no overall relationship between social class and the exercise of parental choice, there were often strong relationships at the local (school) level.
2. Avoidance of the local (catchment area) school was important for a majority of parents who made a placing request in each of our case-study areas.
3. For a majority of these parents, choice involved finding a satisfactory alternative to the local school rather than making an optimal choice from a wide range of possible schools.

4. In requesting schools for their children, parents claimed that they were influenced much more by geographical and social factors, for example proximity and discipline, and by the general reputation of the school, than by educational considerations, for example the curriculum, teaching methods or examination results. Moreover, they relied on rather limited and second-hand information about the schools concerned.
5. Appeal committees tended to uphold the authorities while the courts, on the whole, upheld the parents.
6. Because of declining school rolls and because most intake limits have not been challenged in the courts, few schools have been really overcrowded. However, some were certainly full to capacity, while a rather larger number of schools were chronically under-subscribed. Nevertheless, there have been very few school closures.
7. On the whole, the schools which gained most pupils were formerly selective schools in middle-class areas, while the schools which lost most pupils have been those that served local authority housing schemes in deprived peripheral areas.
8. There was considerable evidence of 'band wagon' effects, and little evidence of the market functioning as a self-correcting mechanism. Success in attracting pupils often led to further success while schools that lost pupils found it very difficult to prevent the outflow continuing.

Many of the findings have been confirmed by more recent research. Echols *et al* have shown that the schools which were selected tended to be formerly selective schools with above-average attainment levels and pupils from higher socio-economic backgrounds, and that the incidence of choice was a function of the opportunities available in the local 'community'.⁴ Willms *et al* have demonstrated that parents tended to choose schools with better (unadjusted) examination results and higher socio-economic status pupils.⁵ However, parents found it difficult to gauge the 'added value' that a school would contribute to their child's examination

performance.⁶ Consequently, parents' choices only marginally benefited their children in terms of better examination results. Thus, although parents' choices appear rational in the sense that they increase their children's performance in examinations, the effects are not as great as they would appear at first sight to be. Moreover, the moderate gains for some pupils are associated with high costs for others (in particular pupils at schools in deprived areas which lose a substantial number of pupils) and for the system as a whole. Although there is no *a priori* reason why parental choice should increase social segregation, the available evidence suggests that it does and that this is likely to result in greater inequalities in attainment.

THE BALANCE SHEET

Evidence from a decade of open enrolment in Scotland suggests that parental choice has resulted in a rather inefficient use of resources since expenditure per pupil is much higher in a school with a small roll than a school with a large one.⁷ It has also led to marked differences between schools since, even without formula funding, schools which lost pupils also lost staff and resources and could no longer offer comparable educational opportunities. Combined with increasing social segregation, parental choice poses a serious threat to equality of educational opportunity with potentially very serious implications in a democratic society. In Scotland it has already led to the re-emergence of something resembling a two-tier system of secondary schooling in the big cities. This is different from the old, two-tier system that existed prior to the introduction of comprehensive schooling in that the lower tier now caters for a minority of children whereas before it catered for the majority. The existence of a small number of rump schools located in the most deprived areas of the big cities is clearly a serious cause of concern.

Although there have clearly been gainers as well as losers from the Scottish legislation, the balance sheet suggests that the gains have been relatively small compared with the losses. Those who have gained have done so at the expense of others and, by and large, those who have lost have been those who could least afford

to do so. Thus, parental choice in Scotland appears to have been a 'negative sum' game in which the gains achieved by some pupils have been more than offset by the losses incurred by others and by the community as a whole. The result of aggregating individual choices, which may themselves be rational, is a situation which can fairly be described as irrational. Moreover, the problems outlined above can only become greater as the incidence of placing requests continues to increase as it will almost certainly do. This is partly because education has many of the characteristics of a 'positional good', i.e. something which is desired because of the status associated with having it.⁸ Since the scarcity value of a positional good diminishes as the number of people choosing it increases, 'first order choices' provoke 'second order choices' as people attempt to retain their higher status.

Widening disparities in educational provision can also be attributed to other legislative developments. Of particular importance here are the provisions in the 1988 Education Reform Act (replicated for Scotland, in the 1989 Self-Governing Schools etc. (Scotland) Act) which allow parents to decide, in a secret ballot, whether they wish their child's school to opt out of local authority control and become a grant-maintained (England and Wales) or a self-governing (Scotland) school funded directly from central government. Although the final decision rests with the Secretary of State, proposals to change the status of the school require the support of a majority of parents. Opted-out schools may not change their character or their admissions arrangements immediately or without the approval of the Secretary of State, but the future direction of policy is quite clear. This has recently been made quite explicit in the White Paper which seeks to promote much greater diversity and specialisation in schools, to further diminish the role of the local authority and actively to encourage opting out.⁹ The aggregate effect of these changes is almost certain to increase the extent of parental choice of school.

A vital question is whether the impact of parental choice of school in England and Wales in the 1990s will resemble the impact of parental choice of school in Scotland in the 1980s. Unfortunately, there are several grounds for thinking that it will be

considerably more problematic. First, there is less of a tradition of collectivism in England than in Scotland and, for this reason alone, the incidence of parental choice in English urban areas will probably turn out to be higher than in Scotland. Second, the existence of much larger ethnic minority populations in many English cities raises the prospect of ethnic segregation on a scale that simply could not exist in Scotland where the ethnic minority population is very much smaller. Where, for example, white and Asian parents want their children to go to schools with children from similar backgrounds, it would appear that there is little a local authority can do to prevent this.¹⁰ Third, the policy context is very different. The publication of examination results will affect schools' reputations (whether deservedly so or not) and will almost certainly boost choice while the introduction of formula funding will make it much more difficult for local authorities to support schools that may be in need of a measure of protection. Although resources may be used more efficiently, they may also be used less effectively. Fourth, since more than 300 schools in England have already opted out of local authority control while none in Scotland has so far done so and since the White Paper (referred to above) only applies to England and Wales, diversity and, hence, the rationale for choice are both likely to be more pronounced in England and Wales than in Scotland.

AN ALTERNATIVE APPROACH

It does not follow from the arguments set out above that parents should be deprived of their rights to express a preference for the schools they wish their children to attend. In any case, it would be extremely difficult in practice to bring this about. However, a better balance between the rights of parents to choose schools for their children and the duties of education authorities to promote the education of all children is clearly needed. In the remainder of this Briefing, five proposals which, taken together, could help to secure a better balance between these concerns are briefly outlined.¹¹

1. As a prerequisite, the fiction that all primary and comprehensive secondary schools provide an identical set of educational opportunities and the aspiration that they should strive to do so should both be abandoned. Over and above the common core curriculum, schools should be encouraged to develop particular curricular strengths. Schools should also be encouraged to develop and promote their own particular teaching styles, institutional ethos and extra-curricular activities. These different school characteristics would, in part, reflect the views of Governing Bodies and School Boards, in part those of the headteacher and the teaching staff, but education authorities would have an important role to play in preventing all schools from adopting the same set of characteristics and ensuring an appropriate degree of diversity.
2. In order to ensure the widest possible access to a range of schools with different characteristics, school catchment areas should be abandoned. Although open enrolment implies that parents may send their children to any school, most children still attend the school serving the catchment area in which they live. This is because most education authorities still use catchment areas and because parents are required to take the initiative if they do not want their child to attend the catchment area school. In towns and cities, school catchment areas often do not represent local communities or neighbourhoods. Where they do represent local communities or neighbourhoods, they constitute the major source of inequality in educational attainment at school level and thus the major obstacle to equality of status and parity of esteem between schools.
3. Much more thought needs to be given to the interests that the right of school choice is trying to protect. At present, the legislation seeks only to protect parents' interests in choice. However, since parents act as agents of their children but are not all equally effective in this regard, children's interests need to be considered directly. This would entail efforts to ensure that children attend those schools which are best suited to their particular personalities and

talents. Teachers and parents will often have different views as to what these are: it is therefore important to find some means of involving them both in decision-making. A recent IPPR report refers to the need to emphasise co-operation rather than competition.¹² This would call for improved parental participation in decision-making rather than increased avoidance of unsatisfactory schools, or using Hirschman's terminology, mechanisms that enhance 'voice' rather than 'exit'.¹³ Discussions between teachers, parents and, in the case of older pupils, the pupils themselves would enable all of these parties to examine each other's reasoning, and decide what the child's interests are and how they can best be furthered. They would lead to recommendations for a particular school (or schools) in much the same way that careers guidance (at a later stage) leads to recommendations for further education, training or employment.

4. Instead of providing an escape-route for a minority of parents who do not wish their children to attend the local (catchment area) school, legislation would seek to enhance the interests of all children by setting up procedures for assessing their needs and identifying the schools at which they are most likely to thrive. Where the number of pupils who are matched with a school in this way exceeds the number of places available, priority would - subject to local authority policy on the composition of the school (see below) - be given to those pupils whose cases are most strongly supported through the procedures outlined above. This should ensure that schools are chosen for children rather than *vice versa*.
5. A greater measure of protection would be given to schools that have lost pupils and to the pupils who attend these schools. One way of achieving this would be to enable education authorities to set limits on the admission of pupils to schools that have gained pupils where there are good reasons for so doing. Scottish research indicates that the imposition of admission limits on the most popular schools can provide a measure of protection for less popular

PROV schools although these limits lack statutory force.¹⁴ Local authorities would still be responsible for formulating a set of general policies, for example in relation to minimum, optimum and maximum school sizes and appropriate ability, social or racial mixes for schools;

CON The proposals outlined above challenge a number of beliefs which are strongly supported on the left and the right of the political spectrum. Thus, on the one hand, they reject the view that all schools (and all teachers) should be able to cater equally well for all children and attach less importance to the links between schools and the communities in which they are located; on the other hand, they reject the view that parents always know what is best for their children and question the appropriateness of internal markets in education.

PROV Proposals 1 and 2 bear some resemblance to policies that are currently being pursued by the government although they differ quite markedly from them in that they envisage a much more important and continuing role for local authorities. Proposals 3, 4 and 5, on the other hand, are rather different in their emphasis in that they seek to promote co-operation in place of competition and to offer a greater measure of protection to the most vulnerable schools and pupils. Taken together, the five proposals constitute an alternative approach to education policy which takes choice seriously but attempts to avoid the most unacceptable consequences of recent legislation, and to produce better balance between the rights of parents to choose schools for their children and the duties of local authorities to promote the education of all children for whom they are responsible.

Although they differ in some respects from proposals outlined in NCE Briefing No. 7,¹⁵ e.g. in the attempt, within limits, to foster diversity, in the involvement of primary school teachers in the allocation of children to secondary schools and in the procedures for selecting children for schools which are oversubscribed, it is significant that they have several common features, e.g. requiring all parents to make a choice,

providing help and advice to parents and paying for children's transport to and from school.

CONCLUSION

Liberal economic theory assumes that individuals are the best judges of what is in their own interests. Whether or not this is true, it is fairly clear that parents are not necessarily the best judges of what is in their children's interests. However, this situation is not one which parents themselves can remedy. The problem is structural rather than motivational. Institutional changes, which would enable all parents, with the assistance of teachers, to make more informed choices about the types of school which would best promote their children's learning and thus further their children's interests, and which would re-emphasise some of the legitimate collective policy concerns which have been eclipsed by the construction of a 'quasi market' in education need to be introduced.¹⁶ It would be fanciful to suggest that the task is going to be easy, but it would similarly be defeatist to conclude that, because it is clearly going to be difficult, it should not be attempted.

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CHAPTER 4

PARENTAL CHOICE AND THE ENHANCEMENT OF CHILDREN'S INTERESTS

I have suggested elsewhere¹ that the changes brought about by the parental choice provisions in the 1980 Education Act and the 1981 Education (Scotland) Act (which were inserted into the 1980 Education (Scotland) Act) can be interpreted in a number of ways:

- As a shift away from an authority-wide approach to school admissions (which enables education authorities to prevent overcrowding and under-enrolment, deploy resources in an efficient manner and pursue their own conception of social justice) towards a parent-centred approach (in which parents decide what is best for their children and parents' concerns have priority over those of the education authorities).
- More generally, as a shift away from a collective-welfare orientation (which focuses on the achievement of collective ends, is primarily concerned with the overall pattern of decision-making, develops rules and procedures to achieve the programme's ends, and recognises the necessity for trade-offs between the various ends the policy is trying to achieve) towards an individual-client orientation (which focuses on each individual case, respects individual autonomy and assumes that individuals are capable of deciding and acting for themselves, allows individuals to challenge unfavourable decisions and precludes the possibility of trade-offs).
- As the first step of a two-part deregulation of the educational system in which market-like relationships between schools and parents replace bureaucratic and political forms of accountability. In this two-stage process, the first stage comprised the introduction of the delegation of powers and responsibilities from education authorities to individual schools and a greater involvement of parents in their management.

Prior to 1988, deregulation had proceeded further in Scotland than in England and Wales. This is because the parental choice provisions in the 1981 Education (Scotland) Act were considerably stronger than the analogous provisions in the 1980 Education Act, and Scottish education authorities had much weaker powers to control school admissions than local education authorities in England and Wales. Under both pieces of legislation, parents were given a statutory right to request the school they wished their children to attend, the circumstances in which authorities could reject parents' requests were restricted, and parents were given the right of appeal to a specially constituted appeal committee. However, the two pieces of legislation differed in three important respects:

- While the statutory exceptions to the authority's duty to comply were broad and general in the English legislation, they were much more specific in the Scottish legislation. The primary exception in England, which applied (under Section 6(3) of the 1980 Education Act) when compliance 'would prejudice the provision of efficient education or the efficient use of resources', enabled an authority to justify a refusal by referring to conditions in schools other than the one requested by the parents. By contrast, the primary exceptions in Scotland, which applied (under Section 28A(3) (a) of the 1980 Education (Scotland) Act) when compliance would either entail the appointment of an extra teacher or significant extensions or alterations to the school or 'be likely to be seriously detrimental to the order or discipline of the school or to the educational well-being of the pupils there', meant that the authority could only refer to conditions at the school requested by the parents.
- Whereas in England the decision of the appeal committee was final, in Scotland parents could appeal against an adverse appeal committee decision to the courts. This not only gave parents a second chance to appeal but also allowed appeals to be heard by a sheriff, whose civil jurisdiction is roughly equivalent to that of an English county court judge, who is clearly independent of the local authority and less likely than an appeal committee to be predisposed in favour of its concerns.

- When an appeal is upheld in Scotland, either by an appeal committee or a sheriff, the authority is required to review the cases of all parents in similar circumstances who have not appealed and, if its decisions are unchanged, it must grant the parents a further right of appeal. There were no analogous provisions in the English legislation.²

It is true that stronger demand-side deregulation in Scotland was partially offset by a greater degree of supply-side deregulation in England and Wales. Thus, school governing bodies in England and Wales had somewhat greater powers than Schools Councils in Scotland but this was of little significance since neither was in any position to mount a serious challenge to the centralised decision-making powers of the local authority.

The position in England and Wales was completely changed by the provisions of the 1988 Education Reform Act. In relation to parental choice, the Act strengthened the rights of parents and reduced the powers of local education authorities, introducing a form of 'open enrolment' similar to what Scotland has had since the early 1980s. Local education authorities were prohibited from setting maximum admission limits below the physical capacity of the school and from refusing to admit children when there was room for them at the schools. Section 26(1) of the Act equates 'physical capacity' with the 'standard number' and stipulates that 'the authority ... shall not fix as the number of pupils in any relevant age group it intends to admit to the school in any school year less than the relevant standard number' which is defined (under Section 27(1)) as either the number of pupils admitted to the school in 1979, when school rolls were substantially higher than they were a decade later, or the number admitted in the previous year whichever is the greater.

In relation to the local management of schools, the 1988 Education Reform Act introduced a degree of delegated financial management which is substantially greater than that envisaged even under the 'ceiling' provisions of the 1988 School Boards (Scotland) Act. Thus, in England and Wales, the governing bodies of all secondary

schools and primary schools with more than two hundred pupils now receive budgets from the local authority that they are free to spend as they wish. The budget covers the vast majority of schools' running costs, including staff salaries. School governors can decide what to spend the budget on, that is how much should go on teachers' salaries and how much, say, on support staff or school equipment. Schools are expected to operate rather as though they are small businesses: their income depends, to a very large extent, on their success in attracting pupils since about 70 per cent of the local authority's education budget is distributed to schools by means of a formula (which must be approved by the Secretary of State) in which a minimum of seventy-five per cent is in direct proportion to pupil numbers, weighted by age.³ By contrast, schools do not control their own budgets in Scotland and school boards only have limited powers.⁴ These include taking part in the appointment of senior staff, approving the headteacher's plans for buying books and materials and receiving and making representation on reports from the headteacher and the education authority. Under the 1988 School Boards (Scotland) Act, school boards can ask to be given further powers, for example to decide which children can enter the school, to determine what is taught in the school and to 'hire and fire' staff, but none has actually done so.

Considering these two sets of developments together, it is clear that demand-side deregulation in England and Wales has caught up with its earlier development in Scotland while supply-side deregulation has been taken a good deal further. The 'uncoupling' of schools from local authorities and the replacement of bureaucratic and political forms of accountability by market-like relationships between parents and schools has been taken a stage further in England and Wales than it has in Scotland. How long this disparity will be allowed to continue, particularly following the 1992 election victory for the Conservatives, is a matter for conjecture.

THE IMPACT OF PARENTAL CHOICE IN SCOTLAND

In an attempt to assess the significance of the parental choice provisions introduced into Scotland by the 1981 Education (Scotland) Act, Alison Petch, Jack Tweedie and I carried out a programme of research into the origins, implementation and impact of the legislation. Our research was carried out between 1983 and 1986 and reported on in a recently published book.⁵ Our main findings were as follows:

- Across Scotland, about ten per cent of parents have made a placing request' for their child, at entry to primary school and at transfer to secondary school. (The latest available figures (Scottish Office Education Department, 1991) indicate that 14.2 per cent of the parents of children in Primary 1 (P1) and 11.1 per cent of the parents of children in Secondary 1 (S1) made a placing request in 1989/90.) However, in the cities, the proportion has been much higher (20-25 per cent) and, in some city areas, it has been more than 50 per cent.
- These requests have come from right across the social class spectrum. However, although there was no overall relationship between social class and parental choice, there were often strong relationships at the local (school) level. Whether or not this has led to increased social segregation is an important question, although it is not one which we were in a position to answer.
- Avoidance of the district school was important for a majority of parents who made a placing request in each of our case-study areas. For the 150 parents of P1 children in our sample who made a placing request, avoidance of the district school was important for 60 per cent (range 54 to 78 per cent in three case-study areas); for the 290 parents of S1 children in our sample who made a placing request, it was important for 69 per cent (range 61 to 81 per cent in four case study areas). For a majority of these parents, choice involved finding a satisfactory alternative to the district school rather than making an optimal choice from a wide range of possible schools. At S1, 62 per cent of

those who made (or considered making) a placing request considered only one alternative to the district school while 27 per cent considered two alternatives. At P1, the tendency was even more marked; 79 per cent considered only one alternative and a further 17 per cent chose two.

- In requesting schools for their children, parents were influenced much more by geographical and social factors, for example proximity and discipline, and by the general reputation of the school, than by educational considerations, for example the curriculum, teaching methods or examination results. They relied on rather limited and second-hand information about the schools concerned.
- Most requests (about 93 per cent) have been granted either initially or on appeal. However, there has been a significant drop (from 96 per cent in 1982/3 to 89 per cent in 1989/90) in the number of successful requests for secondary schools as authorities have closed annexes, removed temporary accommodation and imposed intake limits to prevent overcrowding.⁶
- Appeal committees have tended to uphold the authorities while the courts have, on the whole, upheld the parents. This is not altogether surprising. Appeal committees contain a majority of councillors and members receive little or no training. The courts always prefer to individualise disputes - thus most sheriffs have focused on the single child who is the subject of the appeal rather than the intake limits set by the authority. Since it is very difficult to argue that the admission of one more child would have any significant effect on a school, most sheriffs have decided in favour of parents. It is fortunate for the authorities that few parents have appealed to the sheriff; in one authority, where there have been a substantial number of appeals, the authority routinely concedes the case at this point.
- Because of declining school rolls and because most intake limits have not been challenged in the courts, few schools have really been overcrowded. However, some of them are certainly full to capacity, while a rather larger number of schools are chronically under-subscribed. Some secondary schools in urban areas now have first-year intakes of substantially less than one

hundred pupils. In 1985, two out of twenty non-denominational secondaries in one city we studied and two out of ten in another had first-year intakes of less than 100; by 1988, the number of such schools had risen to eight.

- On the whole, the schools that have gained most pupils have been the formerly selective schools in middle-class areas. In contrast the schools that have lost most pupils have been those that serve local authority housing schemes in deprived peripheral areas. The effects of these movements on aggregate attainment levels and on the distribution of attainment between schools and pupils remain to be seen, but could well be quite substantial.
- There was considerable evidence of 'band-wagon' effects, and little evidence of the market functioning as a self-correcting mechanism. This is presumably because schools with diminishing rolls lose resources and parental support and frequently experience a fall in morale, all of which make it more difficult for them to attract additional pupils. The continuing decline in school age population has meant that few schools have actually been overcrowded.

These outcomes have given rise to a very inefficient use of resources since, other things being equal, expenditure per pupil is much higher in a school with a small roll than a school with a large one.⁷ There have also been widening inequalities between schools since, even without formula funding, schools that lose pupils also lose staff and resources and can no longer offer comparable educational opportunities. The result of aggregating individual choices that may themselves be rational is a situation that many people would describe as irrational.⁸ Perhaps more importantly, the threat to equality of educational opportunity has potentially very serious implications for a democratic society. In Scotland it has already led to the re-emergence of a two-tier system of secondary schooling in the big cities. This is different from the old, two-tier system that existed prior to the introduction of comprehensive schooling in that the lower tier now caters for a minority of working-class children whereas before it catered for the majority. However, the existence of a small rump of what are, in effect, junior secondary (secondary modern) schools located in the most deprived areas of the big cities is surely a cause of concern. What will happen when school

rolls start to increase (as they will in a few years' time) and the second stage of deregulation starts to take effect (in England and Wales if not for the moment in Scotland) remains to be seen.

Although there have clearly been gainers as well as losers from the Scottish legislation, the balance sheet suggests that it has not achieved an optimum balance between the rights of parents (to choose schools for their children) and the duties of education authorities (to promote the education of all the children for whom they have responsibility). Although some children may have gained from the legislation, it would seem that they have gained at the expense of others and that those who have lost are those who could least afford to do so.

PARENTAL CHOICE AND SOCIAL JUSTICE

There would seem to be a *prima facie* case for arguing that the parental choice provisions in the 1981 Education (Scotland) Act offend not once but twice against John Rawls' second principle of justice for institutions. According to Rawls,⁹ justice requires that social and economic inequalities should be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle; and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

The just savings principle refers to the sacrifices which people in one generation may make in order to secure advantages for those, including the least advantaged, in subsequent generations. One would need to have a great deal of faith in the 'trickle-down' effects of market forces in order to justify the educational disadvantages which the legislation has imposed on the most deprived children in the most deprived areas

of society in order to satisfy the first condition. In any case, as Jonathan¹⁰ has pointed out,

‘Unless it is argued that ability and talent standardly correlate with parental agent-effectiveness (i.e. parental choice) then the predictable allocation of prizes in the market-competitive education game must represent a regrettable waste of human capital.’

Since children's access to schools is mediated through their parents, and some parents will actively seek to promote their children's interests while others are indifferent towards them, it cannot be argued, from the standpoint of children, that schools are open to all under conditions of fair equality of opportunity. Thus, the parental choice provisions in the legislation do not appear to satisfy the second condition either.

It does not follow, or at least it should not follow from anything I have written so far, that a ‘rights strategy’ should be abandoned and that parents should be deprived of their rights to choose, or at least, express a preference for the schools they wish their children to attend. I should add, in parentheses, that even if this were thought to be desirable in principle it would be extremely difficult to bring this about in practice. If I have understood her correctly, I part company at this point with Jonathan's otherwise admirable critique of recent changes in educational policy¹¹ in that she would appear to be prepared to do just that.

My own position is that parents do have a legitimate concern with their own children's education and that this does extend to choice of school, and indeed to choice of subject (and possibly even to choice of teacher) within the school. This is because schools are not and ought not to be identical in all respects, and because some children will be happier and perform better in some schools; other schools will be more congenial and more appropriate for other children. At the same time, education authorities do have a legitimate concern with the education of all children in the community.

GOOD SCHOOLING AS A SOCIAL RIGHT

As Brighouse and Tomlinson emphasise in a recent Institute of Public Policy Research (IPPR) paper,¹² 'it ought to be the entitlement of every child to attend a successful school'. They go on to argue that this necessarily demands some fettering of the application of market principles to the provision of education since these principles produce 'losers' as well as 'winners'. However, this situation undermines the basis of citizenship. They argue:

'To accept such a state of affairs in the design of provision and management of schools is to accept that some of our future citizens, through no fault of their own, are doomed to receive education in schools known to be "failing".'

Like Brighouse and Tomlinson, I would also argue that every child ought to attend a 'successful' school and that market principles cannot be applied to education because they would result in some children going to schools that are clearly 'unsuccessful'. However, it is important to emphasise that there is no agreement, and probably never will be any agreement, as to what constitutes a 'good' or 'successful' school. This is because 'good schooling' and 'successful schooling' are 'essentially contested concepts',¹³ - there exist a number of coherent, plausible, and attractive conceptions of the 'good' or 'successful' school, each of which rests on different sets of value assumptions. The publication of 'league tables' comparing the examination results of pupils in secondary schools, such as those released just before the election by the then Scottish Education Minister¹⁴ and even the development of more sophisticated measures of the 'added value' which can be attributed to the school¹⁵ convey the impression that schools can be ranked in terms of a single criterion. Schools can, of course, be ranked on other criteria and, in terms of this particular criterion, schools with the same score (on either scale) may have little in common with each other. In any case, different pupils respond to different schools in different ways - thus, those school characteristics which are conducive to a particular conception of 'success' for

one child may be quite different from those which are conducive to the same conception of 'success' for another child.

A BETTER BALANCE BETWEEN INDIVIDUAL AND COLLECTIVE CONCERNS: FOUR PROPOSALS

It is my contention that, in the recent past, many authorities were not sufficiently sensitive to parental concerns, but that, in attempting to redress this imbalance, legislation has placed too much emphasis on parental choice, and that this has, in turn, led to the re-emergence of unacceptable educational inequalities. Thus, the correct balance between individual rights and social justice, and between parental choice and equality of educational opportunity has still to be found. In the remainder of this chapter I propose to indicate how I think a better balance could be struck.

Encouraging diversity

As a prerequisite, I think it will be important to abandon the fiction that all primary and (comprehensive) secondary schools provide an identical set of educational opportunities and the aspiration that they should strive to do so. The common core curriculum (whether introduced on a consensual basis as in Scotland or imposed, by statute, as in England and Wales) provides the key to this. Over and above the common core curriculum, schools should be encouraged to develop particular curricular strengths, for example in music, the arts, sports, modern languages or technology. Education authorities could play a very important role here, similar to that played by the Universities Funding Council (UFC) in relation to universities, in the allocation of minority subjects to particular schools. In addition to developing particular curricular strengths, schools should also be encouraged to advance their own particular teaching styles, institutional ethos and extra-curricular activities. Of course, schools already differ in all these respects: what I am advocating is that they should be far more explicit about these differences than they currently are. Some schools might emphasise progressive child-centred learning while others stressed

traditional didactic teaching; some might draw attention to their orderly, structured and disciplined atmosphere while others referred to their encouraging, non-authoritarian and tolerant characteristics; and different schools would highlight particular after-school activities, school exchanges and trips and competitive sports fixtures which they were particularly keen to promote. These different school characteristics would reflect, in part, the views of school boards and school governing bodies and, in part, those of the headteacher and the teaching staff, but education authorities would have an important role to play in preventing all schools from adopting a common set of characteristics, and in ensuring an appropriate degree of diversity.

Abolishing catchment areas

In order to ensure the widest possible access to a range of schools with different characteristics, all artificial barriers to school admissions should be abandoned. I am referring here, in particular, to school catchment areas. Although open enrolment implies that parents may send their child to any school, almost ninety per cent of children in Scotland (and, one may assume, a similar proportion in England and Wales) still attend the school serving the catchment area in which they live. This is because most education authorities still use catchment areas and because parents are required to take the initiative if they do not want their child to attend the catchment area school. In towns and cities, it is rarely the case that school catchment areas represent local communities or neighbourhoods and more common for them to reflect administrative boundaries which have little salience for the population. Where they do represent local communities or neighbourhoods, they constitute the major source of inequality in educational attainment at school level and thus the major obstacle to equality of status and parity of esteem between schools. Of course, if children are to be really free to attend schools outside their neighbourhoods, free travel will probably have to be provided.

Promoting children's interests

Much more thought needs to be given to the interests that the right of school choice is trying to protect. At present, the legislation seeks only to protect parents' interests in choice. Since, as Jonathan¹⁶ points out very clearly, parents act as agents of their children but are not all equally effective in this regard, we need to consider children's interests directly. As schools already differ in many ways and would differ even more if my proposals were enacted, this would entail efforts to ensure that children attend those schools that are best suited to their particular personalities and talents. Teachers and parents will often have different views as to what these are: it is therefore important to find some means of involving them both in decision-making. In another recent IPPR paper, Miliband¹⁷ refers to the need to emphasise co-operation rather than competition.

‘It is the rules governing choice/preference that tilt the balance towards competition or co-operation but no system can eradicate either of them. The trick is to promote collaboration at all levels: between pupils, between parents and teachers and between teachers and LEAs.’

If all schools were required to produce genuinely informative prospectuses; if parents and pupils were encouraged to visit all the schools concerned (rather than discouraged as is often the case at present); and if discussions were to take place between teachers, parents and, in the case of older pupils, the pupils themselves, this would enable teachers, parents and pupils to examine each other's reasoning, to decide what the child's interests were and how they could best be furthered. Miliband continues.

‘Education and public services require a far more interactive relationship between client and provider. Parental input to school choice, often assumed to be inimical to a co-operative school system, can help match children to schools. ... Involving parents in choosing schools can be the first step towards a more productive relationship

between school and parent for the rest of the child's school career: education is, after all, a partnership.'

It is worth mentioning in this context that, if 'norm-referencing', which is currently the dominant approach to testing in primary and secondary schools, were to be replaced by 'criterion-referencing', teachers could use children's test results to discuss their progress to date with their parents and to advise on what would best promote their progress in future.

Protecting vulnerable schools

A greater measure of protection needs to be given to schools that have lost pupils and to the pupils who attend these schools. Parental choice has produced a number of chronically under-subscribed schools (mainly in deprived urban areas) which cannot provide educational opportunities comparable to those provided by other schools. However, in a democratic society, it is widely regarded as unacceptable that some children, through no fault of their own, should have many fewer educational opportunities than others. One way of preventing this would be to enable education authorities to set limits on admissions of pupils to schools which have gained pupils where there are good reasons for so doing, even if school rolls are less than the physical capacity of the schools (as in Scotland) or the numbers admitted in 1979 when school rolls were at their peak (as in England and Wales). Our own research indicated that the imposition of admissions limits on the most popular schools in one of the cities we studied provided a measure of protection for less popular schools although these limits lacked statutory force.¹⁸

Over and above that I would wish to reactivate a set of proposals which Bondi and I put forward in an article on the problems created by falling primary school rolls.¹⁹ These involve the (local) education authority in determining a set of general policies, for example in relation to minimum, optimum and maximum school sizes and facilities, appropriate ability, social or racial mixes for schools, and in deciding on the

level of financial support available for groups of schools serving particular communities. The education authority would, in addition, be responsible for costing and identifying the advantages and disadvantages of different configurations of schooling for the area, as Strathclyde Region has recently done²⁰ and as Lothian Region is currently doing. However, the decision as to which configuration would be adopted would not be taken by the education authority (as was the case in Strathclyde and Lothian) but, rather, by the affected parties in the local community. In this way, within the budgetary limits and the policy constraints laid down by the education authority, local communities could decide which configuration of schooling they preferred. It would, however, be incumbent on the education authority to lay down the procedures which local communities would be required to follow in reaching a decision.

AN ALTERNATIVE APPROACH TO PARENTAL CHOICE

Taken together, the four proposals outlined above constitute an alternative approach to education policy which takes choice seriously but, by structuring choice differently and altering some aspects of the context in which choice takes place, attempts to avoid some of the most unacceptable consequences of parental choice as constituted by the 1981 Education (Scotland) Act and, in all probability, by the 1988 Education Reform Act. In particular, it seeks a means of promoting children's interests and rehabilitating some legitimate collective policy concerns which have been entirely subordinated to parental choice by the 1981 Act in Scotland and the 1988 Act in England and Wales.

Because the most unacceptable consequences of parental choice are to be found in large towns and cities, the proposals outlined above are likely to have their greatest impact there. However, that is a strength rather than a weakness. In any case, they are likely to have some impact on all schools, including rural schools and schools serving sparsely populated areas where parental choice is of little significance. Such schools would be enjoined to eschew monolithic characteristics and to avoid

competing with each other on a single set of criteria. They could, in fact, be encouraged to assume some of the characteristics of the 'omnibus school', first advocated as a model for secondary education by the Advisory Council on Education in 1947²¹ just as the omnibus school would have catered for all (academic and non-academic) pupils from a given area, albeit in rather different ways, so schools serving large areas could be encouraged to develop a number of different teaching styles and curricular programmes for children who would derive particular benefits from them. Such schools would attempt to provide a diversity of provision under one roof which compares with that offered by a number of different schools in an urban area. The modern department store which sub-lets floor space to a variety of retailers provides a model for such a school.

RESPONSES TO CRITICISM

The proposals outlined above have been criticised from many quarters. One set of critics is concerned that the core curricula for pupils aged between five and fourteen in Scotland and in England and Wales are so congested that schools are in no position to develop particular curricular strengths. However, the existence of specialist music schools, denominational schools and City Technology Colleges, as well as the very considerable *de facto* variations in the curricular offerings of primary as well as secondary schools suggest that this criticism is not a particularly strong one. To the extent that the existing national curriculum is felt to impose too much of a straitjacket on individual schools, it would be appropriate to relax it somewhat.

A second set of critics has pointed out that, although different teachers adopt different teaching styles, teachers in a given school are likely to adopt a range of approaches to classroom teaching. This is particularly so in secondary schools where different departments may teach their subjects in different ways. Thus, even if it were possible to produce a robust characterisation of teaching styles it is inappropriate according to these critics to refer to a school's teaching style. Although I do concede that there is some force to this criticism, I think it is overstated. While it is clear that matching can

never be an exact science, choices that are informed by some familiarity with the modes of teaching which the child is likely to encounter (along with other aspects of the school) should help parents and teachers make more informed choices which better promote the interests of the child.

A third set of critics has pointed out that the suggestion that schools might adopt different teaching styles has implications for assessment and would only be feasible if there were corresponding changes in the examination system. This is clearly correct and the two sets of changes would have to proceed hand in hand. However, it is worth noting that the development of criterion referencing and the increasing use of school-based assessment (until government called a halt to these developments) suggest that the examination system is capable of taking on board a wider range of teaching styles than are presently to be found in order to do justice to pupils who learn best and have been taught in different ways.

A fourth set of critics has argued that attendance at a primary school with a particular curricular emphasis might disadvantage a child when it comes to choosing a secondary school. However, the fact that parents and teachers would jointly aim to match a child having a given set of aptitudes and abilities with a school that was conducive to that particular child suggests that this criticism is not a particularly strong one.

A fifth set of critics has suggested that we lack the knowledge to match children with schools and has expressed concern that the process would inevitably come to depend on intelligence and personality tests of dubious validity. While I am certainly not of the view that matching could ever be an exact science and would be vigorously opposed to the use of any tests other than the criterion-based tests that would be supported by the large majority of teachers, I cannot accept that education is, or ought to be, any different from several other areas of professional activity, for example medicine, social work and criminal justice, in which what is known as 'differential diagnosis and treatment' is applied. In any case, if matching were to be

seen as an ongoing process rather than a once-and-for-all event (or, at best, two such events, one for primary school and the other for secondary school) and became part of an annual pupil appraisal, the risk of 'failure' would be greatly reduced as there would be repeated opportunities to correct 'mistakes' when these became apparent.

A sixth set of critics point out that parents and teachers would not necessarily agree on what was best for the child. This is obviously true - parents and teachers do not always agree now in their assessment of the children's ability or potential or over issues like subject choice or examination presentations. However, this objection should not be overstated since many parents and teachers reach agreement now and more could be expected to reach agreement after a full discussion. And, where they fail to agree, then subject to the availability of a place, the parent's view would still prevail much as it does today.

CONCLUSION

Liberal economic theory assumes that individuals are the best judges of what is in their own best interests. Whether or not this is true, it is fairly clear that parents are not necessarily the best judges of what is in their children's best interests. However, this situation is not one which parents can themselves remedy. The problem is structural rather than motivational. Institutional changes which would enable parents, with the assistance of teachers, to make more informed choices about the types of school which would best promote their children's learning and thus further their children's interests and which would re-emphasise some of the legitimate collective policy concerns which have been eclipsed by the construction of a 'quasi market' in education²² need to be introduced. It would be fanciful to suggest that the task is going to be easy, but it would similarly be defeatist to conclude that, because it is clearly going to be difficult, it should not be attempted.

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CHAPTER 5

LOOKING BACKWARDS TO THE FUTURE: PARENTAL CHOICE AND EDUCATION POLICY

INTRODUCTION

Policy research, as distinct from research for policy makers, should be emancipatory. It should be mindful of the policy agenda and seek to illuminate problems and potentialities with a view to avoiding the former and exploiting the latter. As such, it is clearly a value-laden enterprise but this need not be problematic if these values are made explicit. In this paper, I look back on a programme of research on parental choice which I carried out more than 10 years ago and explain how this was related to the policy agenda at the time. After summarising the main findings, the research is subjected to some criticism – in particular for its parochialism and its failure to adopt a comparative perspective. The paper then reviews policy developments in Scotland and England since that time, describes the current policy agenda and indicates how further research might respond to this. It concludes that the key policy issue to which research should now be addressed is the relationship between choice and diversity and argues that this problem should be studied comparatively across a number of different educational systems through research which seeks to investigate the implications of each for the other and for other societal values.

RESEARCH IN THE 1980s

In the mid-1980s, together with my colleagues Alison Petch and Jack Tweedie, I carried out a programme of research on the socio-legal and policy implications of the parental choice provisions in the 1981 Education (Scotland) Act. The programme of research, which was funded by the Economic and Social Research Council, comprised five inter-related projects as follows:

- a study of the origins and parliamentary consideration of parental choice legislation for England and Wales as well as Scotland. Our aims here were to examine the emergence of parental choice as an issue; to study the policy-making processes which culminated in legislation; and to explain why the two pieces of legislation differed in significant ways.
- a study of the implementation of the Scottish legislation by three education authorities. Here the aim was to examine how these authorities responded to the legislation; to describe the process of dealing with placing requests (the term used in the legislation to describe requests for a school other than the one to which the child had been assigned by the education authority) and the outcome of this process; and to identify the problems it gave rise to.
- a survey of 1,000 parents with children about to enter primary school or to transfer from primary to secondary school designed, *inter alia*, to elicit the characteristics of parents who made a placing requests and their reasons for so doing.
- a detailed study of appeals to appeal committees and the courts. Our concerns here were to describe how appeals were dealt with and to examine their impact on the policy and practice of the authorities concerned.
- an analysis of the flow of children between schools, which attempted to explain these movements, to identify the characteristics of schools which gained and lost pupils as a result of parental choice, and to describe the impact of parental choice on admissions to primary and secondary schools.

The research was carried out between 1983 and 1986 and led to a series of published articles, unpublished reports and a book.¹

We concluded that both pieces of legislation could best be understood as political rather than educational initiatives and were enacted in spite of the opposition of the main interest groups. Parental choice legislation for England and Wales was promoted by the Conservative Opposition and various neo-liberal 'think tanks' during the period 1974-1979 as an electorally-popular response to perceived dissatisfaction with educational provision. However, when the Conservatives were returned to office in 1979, their commitment to parental choice was tempered by their determination to reduce public expenditure and the parental choice provisions in the 1980 Education Act reflect a compromise between these concerns. Somewhat paradoxically, since there was less perceived dissatisfaction with education in Scotland and less pressure for change, the Scottish legislation contained substantially stronger rights for parents and imposed greater restrictions on education authorities than the English legislation. This reflected a different political judgement by a different Minister of the extent to which education authorities could be trusted not to undermine the government's intentions. The fact that the Scottish legislation was different from that in England illustrates the thesis developed by McPherson and Raab² that, for issues of high political salience (like parental choice), policy making in Scotland involves the separate elaboration of items drawn from the UK policy agenda.

The Scottish legislation had a similar impact on each of the three authorities that were studied in detail. Each was confronted by substantial numbers of placing requests at entry to primary school and transfer to secondary school and, in some cases, these resulted in substantial imbalances in school intakes. However, the authorities differed in the extent to which they responded by imposing 'intake limits' on oversubscribed schools.

At both primary and secondary levels, parents who made placing requests represented a wide cross section of the community. Choice appeared to be motivated by pragmatic and practical concerns rather than by educational considerations. Parents who made a placing request were influenced more by geographical and social considerations, for example proximity and safety at primary level; discipline and the

child's preferences at secondary level, and by the general reputation of the school, rather than by educational considerations, for example the curriculum, teaching methods or examination results. Although most parents appeared to rely on rather limited and second-hand information about schools, they were reasonably well informed about their rights and supported the view that education authorities should be able to refuse placing requests where failure to do so would lead to overcrowding. 'Push' seemed to be more important than 'pull'. Thus avoidance of the local (catchment area) school where this was deemed to be unsatisfactory was the main concern for a majority of parents who made placing requests and 'choice' usually involved selecting the nearest satisfactory alternative to the local school rather than making an optimal choice from a wide range of accessible schools. It involved 'satisficing' rather than 'optimising'.³

Appeal Committees appeared to be exclusively concerned with whether or not the authority had applied its own policy correctly. Most sheriffs allowed parental preferences to prevail unless the individual's circumstances justified an exception. As a result, some education authorities felt able to fix and impose intake limits while others did not. However, because of falling school rolls and because most intake limits were not challenged in the courts, few schools were seriously overcrowded. A few schools were full to capacity while a rather larger number were chronically under-subscribed. In spite of this, there were very few school closures.

Detailed statistical analysis indicated that the majority of placing requests were to an adjacent primary school or to a secondary school involving a short journey. Movement between primary schools was towards larger primary schools and schools whose catchment areas contained fewer social problems but the effect on school mix was relatively small. Movement between secondary schools was also towards larger schools, schools with higher staying-on rates, and schools with better unadjusted examination results. On the whole, the schools which gained most pupils were formerly selective schools in middle class areas, while the schools which lost most pupils were formerly non-selective schools serving local authority housing schemes in

deprived peripheral areas. Strong relationships between social class and movements between schools at the local level had a considerable effect on the social composition of some schools. There was strong evidence of 'band-wagon effects',⁴ i.e. of parents opting for particular schools because they perceive other parents to be doing so, and little evidence of any self-correcting mechanisms at work. Schools which were successful in attracting pupils often had even greater success in subsequent years while schools which lost pupils found it very difficult to stop the outflow.

SCOTLAND AS 'TRAIL BLAZER'

Since the parental choice provisions in the 1981 Education (Scotland) Act established considerably stronger rights and imposed substantially greater restrictions on education authorities than the equivalent provisions in the 1980 Education Act, it made a great deal of sense, in the mid-1980s, to study parental choice in Scotland rather than in England and Wales. Although the two pieces of legislation had a number of common features in that both gave parents a statutory right to select the schools they wished their children to attend, restricted the circumstances in which parents' requests could be rejected by education authorities, and established a right of appeal to a specially-constituted administrative tribunal (known as an Education Appeal Committee), they differed in a number of important respects.

- While the statutory exceptions to the authority's duty to comply were specific and relatively difficult to satisfy in Scotland, they were much broader and rather easier to satisfy in England and Wales. The primary exception in England, which applied when compliance 'would prejudice the provision of efficient education or the efficient use of resources' enabled an authority to justify a refusal by referring to conditions at schools other than the one requested by parents. By contrast, the primary exceptions in Scotland, which applied when compliance would entail either the appointment by the education authority of an extra teacher or significant extensions or alterations to the school or 'be likely to be seriously detrimental to order or discipline at the

school or to the educational well-being of the pupils there', meant that the authority could only refer to conditions at the school requested by the parents.

- Whereas in England, the decision of the appeal committee was final, in Scotland parents could appeal against an unsuccessful appeal decision to the courts. This not only gave parents a second chance to appeal but also allowed appeals to be heard by a sheriff, whose civil jurisdiction is similar to that of an English county court judge, who is clearly independent of the authority and less likely than an appeal committee comprising councillors and other members selected by the authority to be predisposed in favour of the authority's decisions.
- Under the Scottish legislation, when an appeal is upheld, either by an appeal committee or by sheriff, the authority is required to review the cases of all parents in similar circumstances who have not appealed and, if it does not change its decisions, it must grant the parents a further right of appeal. No comparable provisions are found in the English legislation.

Our research suggested that parental choice in Scotland had resulted in a rather inefficient use of resources since expenditure per pupil is much higher in a school which is half empty than in one which is full. It had also led to increasing disparities in schools' financial circumstances since, even before formula funding, schools which lost pupils also lost staff and resources and, as a result, were no longer able to offer comparable educational opportunities. This posed a serious threat to equality of educational opportunity with potentially very serious implications in a democratic society. Moreover, it appeared to be leading to the re-emergence of something resembling a two-tier system of secondary schooling in the big cities. This was different from the old, two-tier system which existed prior to the introduction of comprehensive schooling in that the lower tier catered for a minority of children whereas previously it had catered for the majority. However, the existence of a small

number of no-longer viable 'rump' schools located in the most deprived areas of the big cities was clearly a cause for concern.

Although there had clearly been gainers as well as losers from the Scottish legislation, the balance sheet suggested that the gains were relatively small compared to the losses. Those who gained from the exercise of parental choice and ended up in secondary schools in middle class catchment areas with good 'unadjusted' examination results did so at the expense of those who stayed at seriously under-subscribed and under-resourced schools with deprived catchment areas and poor examination results. Thus, parental choice in Scotland appeared to have been a 'negative sum game' in which the gains achieved by some pupils and, by extension, by some parents were more than offset by the losses incurred by others and by the community as a whole. The choice of a school, like the purchase of a car, may have been a 'rational' decision for each of the individuals concerned, but the aggregation of these individual decisions had resulted in situations (rump schools and congested streets) which, from the perspective of the whole community, could only be described as irrational.⁵ This situation results from what Hirsch⁶ has called 'the tyranny of small decisions' and would not arise if, when making individual choices, people could see and act on the results of their combined choices.

We concluded that this situation could only get worse if the incidence of placing requests continued to rise, as it was almost certain to do. This was partly because education has many of the characteristics of a 'positional good' (*ibid.*), i.e. something which is desired not because of its intrinsic value but because of its scarcity value. Since the scarcity value of a positional good diminishes as the number of people possessing it increases, 'first order choices' provoke 'second order choices' as people attempt to retain their higher status.

ENGLAND CATCHES UP AND TAKES THE LEAD

The contrast between the relatively weak form of parental choice which was established by the 1980 Act in England and Wales and the relatively strong form which was established by the 1981 Act in Scotland persisted for several years. However, in 1987, the government announced that, if it won the forthcoming general election, it would introduce a new Education Act which would strengthen the rights of parents in England and Wales and restrict the powers of local education authorities. These promises subsequently bore fruit in the form of the 1988 Education (Reform) Act.

As far as school admissions are concerned, the 1988 Act sought to prevent local education authorities from setting intake limits which were less than the school's physical capacity and from refusing to admit children if there was room for them at the school. The 1988 Act equates 'physical capacity' with the 'standard number' and stipulates that 'the authority ... shall not fix as the number of pupils in any relevant age group it intends to admit to the school in any school year a number less than the relevant standard number' which was defined as the either the number admitted to the school in 1979 when school rolls were at their peak and were substantially higher than they were a decade later, or the number admitted in the previous year whichever is the greater.

Although the detailed statutory provisions in the 1988 Act are very different from those in the Scottish legislation, the intentions are much the same. Inasmuch as it prevents authorities from referring to conditions in schools other than those chosen by the parents and makes it much more difficult for them to reject parents' requests, it has likewise sought to introduce a regime of 'open enrolment' and brought the position of parents in England and Wales broadly into line with those which were introduced some years earlier in Scotland.

There have been no further legislative changes in relation to parental choice in either Scotland or England since 1988. However, a number of other educational reforms have had an impact on parental choice. Of particular importance here was the introduction of Local Management of Schools (LMS) in England and Devolved School Management (DSM) in Scotland in the late 1980s.⁷ LMS and DSM have a number of common features in that they both attempt to increase competition among schools in attracting pupils, with school budgets largely determined by the number of pupils at the school; to promote lay, especially parental, participation in school decision making; to enhance teachers' accountability to parents; and to delegate more decisions to school level with local education authorities adopting a strategic and enabling role and providing only a small number of central services themselves. However, like parental choice, they differed in a number of significant respects.

- LMS was introduced in England (and Wales) by legislation (the 1988 Education Reform Act) while DSM was introduced in Scotland by more flexible guidelines without prior legislation. LMS was implemented in 1990 whereas the first phase of DSM began some four years later in 1994 and full implementation is not scheduled until 1998.
- Parents constitute a majority of the membership of School Boards in Scotland but parents do not constitute a majority on School Governing Bodies in England and Wales. But, although English Governing Bodies have been given statutory powers on a range of matters including staffing, curriculum and discipline, Scottish School Boards have a largely consultative role and powers which are broadly analogous to those which have been devolved to the Governing Body in England have been devolved to the head teacher in Scotland.
- Scottish education authorities are not required to delegate as high a proportion of the education budget to schools as English LEAs (in Scotland, the minimum is 80 per cent, in England, it is 90 per cent). In addition, they

have more flexibility than their English counterparts in applying their own funding formulae and in devising schemes of delegation to schools. In England, a fixed minimum proportion (80 per cent) of a school's budget is allocated on the basis of pupil numbers weighted for several factors whereas in Scotland the guidelines only require that the 'bulk of funding' is allocated on this basis. School budgets are delegated to the Governing Body in England and Wales but to the head teacher in Scotland.

It would appear to be the case that devolved management has been taken rather further in England than in Scotland. Education authorities retain more powers in Scotland than they do in England and English schools are better able to respond to parental choice than their Scottish counterparts.

Other contextual developments have also been important. In 1986, the Government announced its intention to establish a pilot network of City Technology Colleges (in England and Wales) and Technology Academies (in Scotland). These schools were intended to provide a highly technological curriculum and to cater for 11-18 year-olds in selected inner-city areas. They were to be funded by private capital, run by private educational trusts and, as the title of the promotional booklet *City Technology Colleges : a New Choice of School*⁸ makes clear, were, at least in part, justified and legitimated in terms of parental choice.⁹ Of greater significance are the provisions in the 1988 Education Reform Act (replicated in the 1989 Self-Governing Schools etc. (Scotland) Act) which allow parents to decide, in a secret ballot, whether they wish their child's school to 'opt out' of local authority control and become a Grant-Maintained (GM) school (in England and Wales) or a Self-Governing (SG) school (in Scotland). GM and SG schools, which are funded by central government, are also intended to enhance choice, are largely autonomous in their ability to make decisions and are almost as free to respond to parents wishes as private (independent) schools are.¹⁰ Both these developments have taken much stronger root in England (and Wales) than in Scotland.

Since it has already been demonstrated that, since 1988, the statutory enactment of parental choice in England has been comparable to that which has existed in Scotland since 1981, it is clear from the fact that devolved management, opting out and the establishment of new types of school have all been taken further in England, that Scotland is no longer in the vanguard as far as school choice is concerned. Rather, the boot is now on the other foot.

THE STRENGTHS AND WEAKNESSES OF THE RESEARCH – REFLEXIVE SELF CRITICISM

The research we carried out in Scotland was necessarily a creature of its time and cannot really be faulted for failing to take into account subsequent developments of an academic or a policy nature. It was conducted before the emergence of a fully-developed 'quasi market' in education¹¹ when only the first stage of what subsequently became a two-stage de-regulation of the education system was in place. In this two-stage process, the first stage (the statutory enactment of parental choice) represented a de-regulation of the demand side in education while the second stage (devolved management) represented a de-regulation of the supply side. As a result, the research is now necessarily somewhat dated. Nevertheless, many of our findings have been confirmed by more recent research.

Echols, McPherson and Willms¹² have shown that the secondary schools which parents selected tended to be formerly selective schools with above average attainment levels and pupils drawn from higher socio-economic backgrounds, and that the incidence of choice was a function of the opportunities available in the local community. However, on the basis of a national sample of 3,164 pupils, they also demonstrated that, contrary to our findings, choice was more common among better educated and higher social-class parents. Willms and Echols¹³ demonstrated that parents tended to choose schools with higher socio-economic status pupils and better 'unadjusted' examination results. However, the 'chosen' schools did not differ substantially from the 'rejected' schools once account had been taken of the

background characteristics of pupils at the school. Two inferences can be drawn from these findings : they suggest that parents were unable to gauge the 'added value'¹⁴ that a school would contribute to their child's-educational performance and that parental choice was leading to increased between-school segregation. Consequently, although parents' choices appeared rational in the sense that their children performed better in examinations than they might otherwise have done, the gains were less than at first sight they appeared to be. Moreover, the moderate gains for some have to be offset by the high costs for others (in particular pupils at schools in deprived areas which lost a substantial number of pupils) and for the system as a whole.

In his most recent paper on the effects of parental choice, Willms¹⁵ attempted to measure the extent of segregation in 54 communities in Scotland which had at least two secondary schools. Although he concludes that, as the reform took hold, choice was no longer more common among better educated or higher social-class parents (mainly because more of them were opting for private schools), he also shows that segregation (measured in terms of any of three different segregation indices) increased in large and small communities alike and that the biggest increase was in the isolation of middle class pupils in the five largest cities (Glasgow, Edinburgh, Paisley, Aberdeen and Dundee). Whether or not parental choice *causes* increased social segregation is hard to say. Nevertheless, it is clear that choice is not helping to reduce between-school segregation in Scotland. Although there is no *a priori* reason why parental choice has to increase social segregation, the evidence suggests not only that it has done so but also that it is almost certain to result in greater inequalities in attainment.

Although it is fair to assume that most of our conclusions would still hold, policy developments since the mid-1980s, including the publication of 'unadjusted' examination results in a manner that makes possible otiose comparisons between schools as well as the other contextual developments outlined above, suggest that the time has now come to replicate our research. Any attempt to do so is almost certain to conclude that the impact of parental choice in Scotland is greater now than it was

then and that, as I have already demonstrated, its impact in England is likely to be greater still.

Notwithstanding the fact that our research was a creature of its time and that many of our results have been confirmed by subsequent research, it is clear that it had weaknesses as well as strengths and that, in any attempt to replicate it, efforts should be made to minimise its weaknesses and build on its strengths. Among its strengths was the fact that it comprised five inter-related projects and utilised the full range of available methods of research (including documentary analysis, in-depth interviews, observations, large scale surveys and the statistical analysis of administrative data) so that conclusions from one project using one methodology could be used to cross check conclusions from another project using another methodology. Among its weaknesses was the (not unrelated) fact that it attempted to do too much and that, as a result, it was too unfocused. This criticism applies particularly to the survey which consumed a disproportionate amount of time, effort and resources. The sampling frame was unnecessarily complex – it involved sampling parents who made placing requests, parents who had considered doing so but decided against it, and parents who had not considered it; parents with children starting primary school drawn from one case-study area in each of the three education authorities and parents with children transferring to secondary school drawn from four case-study areas in the three authorities.¹⁶ In addition the questionnaire was far too long – it contained about 150 questions, the multiple choice questions often contained as many as 10 alternatives to choose from and there were a considerable number of open-ended questions; it took far too long complete and code; and many of the questions were never analysed at all or not analysed at the local (school) level. For example, among the unanalysed data are school-level data on ‘administrative competence’¹⁷ which could have been used to differentiate between parents who did and those who did not make a placing request. Our failure to analyse the survey data at the school level is a serious weakness because, as Ball, Bowe and Gewirtz¹⁸ argue

‘while there may be certain principles of choice and market relations, the dynamics of choice are local and specific. The principles have to be related to local conditions, possibilities and histories.’

Glatter and Woods' work on 'local competitive areas' provides further confirmation of the importance of research at the local level.¹⁹

Analysing our survey data also stretched our statistical and computing skills to the limit. For all these reasons, the project which undoubtedly took up the most time and effort not only generated the smallest return but also prevented us from carrying out a series of in-depth interviews with parents as planned. As luck would have it compensation for some of these shortcomings was subsequently obtained when two very experienced data analysts (Echols and Willms) volunteered to reanalyse our data. However, if the survey is to be replicated, a much shorter questionnaire and a much simpler sampling frame would have to be used.

We were very much taken to task in a critical review of our book by Miriam David²⁰ but, although we thought that most of her criticisms were misplaced, we did accept that we could have said more about gender differences.²¹ Likewise, since parental choice seems to have had some rather serious effects on social segregation, it is clear that we should have collected more data about the social composition of schools. In any future research, this deficiency would have to be addressed.

A third weakness was a function of the case study method we adopted. Several small case studies are, in many ways, preferable to one large one because they make comparisons possible and foster an awareness of a range of variation that would not be apparent from focusing on a single case. Although this is true of within country comparisons, it applies with even greater force to comparisons between countries because the range of variation is greater. In this respect, comparisons within the UK are a much under-utilised resource.²² By studying parental choice within a single country (Scotland), a number of important and researchable problems were

foreclosed. One of these problems was the relationship between choice and diversity²³ and, in any further research on parental choice, it would be important to devise a research design which will make it possible to study this extremely important question. Such a research design would necessarily involve comparative research, both within the UK and between the UK and other countries.

PARENTAL CHOICE IN COMPARATIVE PERSPECTIVE

In recent years, there has been a movement to give parents (and pupils) an element of choice in deciding which schools their children should attend. The UK is by no means unique in this respect and similar developments have taken place in most advanced industrial (or should I say 'post-industrial'?) societies. According to Hirsch,²⁴ two main influences have shaped this development, one political and the other social, but, of the two, political influences have generally been the more important.

- The *political influence* has been neo-liberal ideology which has exercised such a profound influence on public policy making in many countries over the last decade or so. In its crude form, it advocates a reliance on free markets rather than centralised planning to manage publicly financed but not necessarily publicly provided services. In education, it has meant making schools dependent for their resources on the decisions of parents to enrol their children. The idea is that this will create pressure on schools to perform well and to reflect the wishes of parents and pupils rather than those of teachers and administrators. Taken to extremes, under a system of education vouchers, this would blur the distinction between public (maintained) and private (independent) schools as every school would be eligible for a payment by the state in respect of every pupil.²⁵
- The *social influence* reflects changing social realities. Greater social and geographical mobility, higher levels of educational attainment among adults and the growth of 'credentialism' have changed the ways in which people

think about schools. An increasing number of them view education as a route to economic and social success and finding the 'right' school for their children is seen by many parents as a way of giving their children a good start in life.

THE AIMS OF SCHOOL CHOICE

On the basis of a comparative study of school choice in six countries (Australia, England, the Netherlands, New Zealand, Sweden and the United States), Hirsch²⁶ isolates four main objectives of school choice. Thus, school choice aims

- *to stimulate and respond to an increased desire to choose among existing schools*, extending to everyone opportunities hitherto only available to those with the means to buy a place at a private (independent) school or a house near a good public (maintained) school;
- *to give parents a greater role, and professional educators a reduced role, in shaping school policy*, again particularly in public (maintained) schools;
- *to establish a new discipline which encourages schools*, in particular, public (maintained) schools, *to perform well* - schools which acquire a good reputation will attract more pupils and thus more resources;
- *to extend the range of choices available to parents* and to encourage greater educational pluralism within the public (maintained) as well as the private (independent) sector.

DEMAND LED OR COMPETITIVE CHOICE VS. SUPPLY LED OR PLURALISTIC CHOICE

Although these objectives overlap, Hirsch has suggested that a very important distinction can be made between *demand led* or *competitive* choice policies, whose aim is to encourage competition, and *supply led* or *pluralistic* choice policies, whose aim is to increase the range of schools available to choose from.

On the basis of comparative evidence, Hirsch suggests that competitive pressures on their own rarely generate much variety, especially in the public sector, and that they create frustration when they are not accompanied by pluralistic choice. This is because competitive choice assumes that there is a measure of agreement about what constitutes a 'good' school, that some schools are 'better' than others, and that all parents will want their children to go to the best schools. These schools quickly become full leading to disappointment for those who are turned away. As John Gray²⁷, referring to school choice in England, put it in an article in *The Guardian*:

'It is not choice that is being exercised when parents, no longer trusting their neighbourhood schools try and fail to place their children elsewhere. [A] Hobson's choice between over-subscribed 'good' schools and under-resourced 'bad' schools is not a freedom that parents greatly value.'

Judith Judd²⁸ made a similar point in a recent article in *The Independent*:

'What the Government has created is a vast appetite for choice with no means for satisfying it...While there is no genuine diversity, parents who cannot get their children into the popular schools will continue to feel conned by the rhetoric of parental choice.'

Hirsch believes that the alternative of a variety of types of school and a range of preferences probably has more going for it although it is more rarely achieved. Likewise Hargreaves²⁹ argues that some combination of diversity and choice is not only intellectually tenable but provides an attractive basis for policy. The challenge for policy makers will be to find some way of promoting diversity without encouraging hierarchy.³⁰ Past experience with principles like 'parity of esteem' (in the UK) and 'separate but equal' (in the USA) suggests that it will not be easy.

OBJECTIONS TO SCHOOL CHOICE

Partly because of its ideological origins and significance, school choice is intrinsically controversial. Just as Hirsch isolated four main objectives, so four sets of objections can be identified. Objectors variously argue that

- *choice might be a fine idea but it will not work in practice*, either because parents who are already more advantaged, i.e. those who have an abundance of 'administrative competence' or 'cultural capital',³¹ are more likely to take advantage of it and, by so doing, add to their advantages; or because (as Gray and Judd point out) popular schools are bound to fill up and, as a result, choice is closed off;
- *choice might work but it will have undesirable side effects* e.g. it may weaken the sense of community, result in increased social segregation and reduce the pressure to improve the educational system;
- *choice in education is self-defeating* because the exercise of choice by some may pre-empt choice for others, e.g. where a minority of parents in a given area choose not to send their children to a particular local school. As a result, the school is no longer viable and has to close although a majority of parents in the area wished to send their children there;

- *putting power into the hands of parents will make schools more conservative and throttle innovation* as schools seek to perform well in those respects which parents regard as important, e.g. good examination results, at the cost of providing a 'good' education.

LIMITS ON CHOICE

The basic element of any *open enrolment* policy is to give parents the right to send their children to any school. However, it may be limited in a number of ways. Countries differ in terms of

- *whether choice is optional or mandatory* - there is clearly a big difference between countries (like Sweden) in which pupils are allocated to a school but may choose a different one if they wish and countries (like New Zealand) in which no-one is allocated to a school and everyone has to choose;
- *whether or not limits are set on school rolls* - in the Netherlands there are no limits and the public authorities have to build or procure extra accommodation for schools that are overcrowded, in New Zealand schools must admit pupils unless they can demonstrate that they are in danger of overcrowding, in France, choice of secondary schools is permitted only as long as the preferred school does not become too full or the local school too empty;
- *how places are allocated when they cannot all be met* - 'objective' criteria are usually adopted, most commonly geographical proximity (although this can end up by restricting places to those who live in a *de facto* catchment area) and one or more siblings already at the school (although this gives an advantage to parents who had previously been able to secure a place for an older sibling when the school was possibly not as over-subscribed). Somewhat paradoxically, the use of such criteria militates against parents who may have good reasons for wanting to send their child to a particular school,

e.g. because they like something about it. Note: selection (by the school), banding by ability or by ethnic group, where they are used, necessarily constrain parental choice

- *whether reasons for choice need to be given or are taken into account* - if reasons are taken into account, parents can 'play the system', if not, parents can choose on 'questionable' grounds, e.g. on the basis of the ethnic composition of the school;
- *whether or not choice is restricted to schools within the parent's education authority;*
- *whether or not choice is restricted to public (maintained) schools and whether or not it extends to private (independent) schools;*
- *whether or not assistance with transport costs is available.*

FORMULA FUNDING AND DEVOLVED MANAGEMENT

For those who see choice as the means of injecting the dynamic of competition into schooling, it is important to give schools an incentive to compete. But effective competition will not result unless parental choice, which represents deregulation of the demand side, is matched by deregulation of the supply side. The two (complementary) ways in which this is most often done are by linking the school's resources to pupil numbers and by giving schools greater autonomy. The former is known as 'formula funding', the latter as devolved management. However, supply side policies are not always adopted and, where they are, there are again a number of variations:

- *a proportion (which may vary in size) of the education budget may be withheld from schools and retained by the education authority to spend on the provision of common services;*
- *a proportion (which may again vary in size) of school budgets may be determined by formula or, alternatively, the education authority may have some discretion to take other circumstances into account;*
- *schools may or may not receive the same resources for all pupils - thus pupils with special needs, children from low-income families or with poorly-educated parents may receive a premium;*
- *schools may or may not be responsible for capital expenditure in addition to current expenditure;*
- *schools may or may not be responsible for staff salaries - where schools are responsible for paying staff salaries, they will have an incentive to make experienced (and expensive) teachers redundant and replace them with inexperienced (and cheaper) teachers;*
- *schools may have more or less autonomy and be subject to more or less control from the education authority.*

THE EXTENT OF DIVERSITY

Parental choice and open enrolment, even where they are accompanied by formula funding and devolved management, do not, in and of themselves, give rise to diversity which requires some central initiative to ensure that all schools do not attempt to compete with each other on the same grounds. The extent to which schools do diversify depends on a number of contingent considerations including:

- *whether or not different types of school exist;*
- *whether or not schools are required to follow a national curriculum and how prescriptive this is;*
- *(related to the above) whether or not schools can specialise;*
- *whether or not schools are encouraged to adopt distinctive teaching and learning strategies, e.g. streaming vs. mixed ability teaching, an emphasis on 'traditional' didactic teaching vs. group project work etc.*
- *whether or not the government or the education authorities actively encourage or actually decree diversity.*

SCOTLAND VS. ENGLAND

The approach taken above enables Scotland to be compared with England and put into comparative perspective. Table 1 does this for parental choice while Table 2 does so for devolved management.

Table 1 : Characteristics of Parental Choice (PC)

	LOW PC	SCOTLAND	ENGLAND	HIGH PC
optional/ mandatory	optional	optional	mixed – mandatory in some areas	mandatory
limits on school rolls	yes	<i>de facto</i> – related to capacity	by statute – related to peak figures	no
how places are allocated when school is 'full'		EA has discretion – distance and siblings carry most weight	EA has discretion – distance and siblings carry most weight	
reasons required or taken into account	yes	not required, not really taken into account	not required, not really taken into account	no
restricted to 'home' EA	yes	no	no	no
restricted to maintained sector	yes	yes	yes	no
payment of transport costs	no	no	no	yes

Two inferences can be drawn from the comparisons in Table 1. First, parental choice appears to be 'stronger' in England than in Scotland and, second, that, in both countries, it falls somewhere in the middle of the range of institutional possibilities.

Table 2 : Characteristics of Devolved Management (DM.)

	LOW DM	SCOTLAND	ENGLAND	HIGH DM
% EA budget delegated to schools	0%	80% minimum	90% minimum	100%
% school budget based on pupil numbers	no restriction	'bulk of funding'	80% minimum	100%
fixed sum per pupil	no	based on age, but extra for special needs	based on age, but extra for special needs	yes
capital expenditure included	no	small capital items only	small capital items only	yes
salary costs included	no	actual costs met (no)	average costs met (yes)	yes
extent of autonomy	low	quite high	very high (LEA schools)/total (GM schools)	total

Similar inferences can be drawn from the comparisons in Table 2. First, devolved management is clearly 'stronger' in England than in Scotland and, second, both countries again fall somewhere near the middle of the range of institutional possibilities.

In light of the above, we should expect the consequences of school choice to be greater in England than in Scotland. In addition, there are two other grounds for thinking that its consequences may be greater in England than in Scotland. First, there is less of a tradition of collectivism and rather greater enthusiasm for the rugged individualism associated with neo-liberal ideology in England (especially in the south of England) than in Scotland. There is likewise probably more dissatisfaction with schooling and less respect for traditional forms of educational governance in England. Scottish secondary schools have stronger links with their associated primaries and Scottish schools are more embedded in the communities they serve than their counterparts in England. Second, social stratification is probably even more pronounced in England than in Scotland. Moreover the existence of large ethnic

minorities in many English cities raises the prospect of parents choosing schools on ethnic grounds on a scale which could not take place in Scotland where the ethnic minority population is very much smaller.³² Both these considerations suggest that the incidence of parental choice in England and its social and educational consequences will be greater than they are in Scotland. Indirect evidence for this conclusion is provided by marked differences in the number of dissatisfied parents who appeal to an Educational Appeal Committee. In 1995, 41,389 appeals were received and 29,520 were decided in England and Wales; 596 were received and 444 decided in Scotland.³³ Taking the difference in population into account, this suggests that parents in England were 7-8 times more likely to appeal than parents in Scotland.

DIVERSITY AND CHOICE

There is a further difference between Scotland and England. As can be seen from Table 3, there is now considerably greater diversity of schools in the public (maintained) sector in England than there is in Scotland.

Table 3: Extent of diversity in England and Scotland

	SCOTLAND	ENGLAND
selective schools	0	250 (approx.)
alternatives to all through' comprehensives	none	middle schools, sixth form colleges
single sex schools	no all boys schools, one or two all girls schools	available in most LEAs
Grant Maintained/Self Governing schools	2	1,200 (approx.) including 150 Technology Schools
City Technology Colleges/Technology Academies	0	15
can schools specialise in particular subjects?	not really	to some extent
can schools adopt distinctive teaching styles?	not overtly	perhaps more easily
central encouragement of diversity?	ineffectual	more effective

CONCLUSIONS

Parental choice and devolved management are both more muted in Scotland than they are in England and the extent of diversity between schools is considerably less. In Scotland, there is a fair amount of competitive choice but very little pluralistic choice – a great deal of competition but very little diversity. In England, there is rather more competitive choice and a fair amount of pluralistic choice – rather more competition but a significant amount of diversity too (albeit muted by clear hierarchies of status and esteem between different types of school). These can be explained in terms of the relative weakness of the political and social influences mentioned above in Scotland and their greater salience in England. The result is that the comprehensive principle and the ongoing commitment to equality of educational opportunity are more strongly supported in Scotland than in England. However, as a result of the failure to encourage diversity between schools, the extent of dissatisfaction with parental choice as more and more parents find themselves unable to enrol their child in the school of their choice is almost certainly growing. And statistics confirm that this is indeed the case. The latest Scottish Office figures indicate that the proportion of placing requests granted has fallen from 92.2 per cent in 1984/85 to 86.9 per cent in 1994/95. In the case of admission to primary schools, it has fallen from 96.7 per cent to 91.4 per cent and, in the case of secondary schools, from 91.6 per cent to 83.2 per cent over the last 10 years.³⁴

Whether there is more dissatisfaction with school choice in Scotland or in England is hard to say. However, the pessimistic assessments given by John Gray and Judith Judd which were cited earlier probably apply just as much (if not more) to the situation in Scotland than they do to England. Since choice is probably here to stay, the challenge for policy makers is to find some way of providing choice (in one form or another) but minimising its adverse consequences for the many parents who are currently disappointed, for the many children who are currently short-changed and for the principles of equity and justice. The challenge for policy researchers is to devise research which will contribute to the solution of this conundrum.

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CHAPTER 6

DECISION MAKING AND APPEALS IN SOCIAL SECURITY: IN NEED OF REFORM?*

INTRODUCTION

In 1971, a celebrated and controversial article by Richard Titmuss, entitled 'Welfare 'Rights', Law and Discretion',¹ was published in *Political Quarterly* on whose Editorial Board Titmuss then sat. In it, Titmuss analysed the relationship between 'legal rule' and 'administrative discretion' in the Supplementary Benefit scheme, the forerunner of Income Support and the Social Fund today. This article, which is based on the Richard Titmuss Memorial Lecture delivered at the Hebrew University in Jerusalem in November 1996,² attempts to assess the strengths and weaknesses of Titmuss' analysis and to provide an alternative theoretical framework which can be used to account for developments during the subsequent quarter of a century. It is in four parts.

Part 1 gives a critical account of Richard Titmuss' attempt to analyse the relationship between rights and discretion in social security; Part 2 develops an alternative approach, based on the work of two American public lawyers (K C Davis and Jerry Mashaw), which distinguishes bureaucratic rules from claimants rights and suggests that the problem is one of achieving a balance between rules, discretion and rights; Part 3 utilises this approach to examine the shifting balance between these three principles in the social security system over the last 25 years; while Part 4 uses it as

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the basis for criticising the proposals outlined in the to reform the system of adjudication and appeals in social security which were outlined in the Consultation Paper on *Improving Decision Making and Appeals in Social Security* (Cm. 3326) in July 1996. Although the stated aims of the Consultation Paper were fairly innocuous, its detailed proposals (which include making staff directly accountable to the Secretary of State for their decisions, shifting the emphasis away from appeals to an independent tribunal to internal reviews by members of staff, encouraging 'paper hearings', enabling most oral hearings to be conducted by a single tribunal member, and dropping the requirement that tribunals should be chaired by a lawyer) would destroy many of the welfare rights which are currently available to recipients of social security. Following the change of government, the fate of these proposals is unclear but the inclusion of a Social Security Modernisation Bill in the Queen's Speech suggests that it is unlikely that they will be shelved altogether.

PART 1: TITMUSS' APPROACH

Titmuss' aim in the *Political Quarterly* article was to discuss policy choices in social security, 'in particular the choice between legal rule and administrative discretion' in the Supplementary Benefit scheme. A number of factors combined to make the article controversial. In addition to being Professor of Social Administration at the London School of Economics (LSE), Titmuss was Deputy Chairman of the Supplementary Benefits Commission (SBC), whose main role was to determine how the discretionary powers contained in legislation governing the Supplementary Benefit scheme should be exercised by staff in local offices. At the time, the scheme was under sustained attack from claimants' unions and other welfare rights organisations who claimed, with some justification, that the discretionary powers were being exercised in very inconsistent and restrictive ways.³ The Supplementary Benefits Commission felt itself to be under siege and this article, by its most distinguished and respected member, should be understood in that context. It is not a detached, academic analysis of the arguments deployed by the various parties in dispute (as one might have expected from a Professor at the LSE) but, rather, a committed and

partisan contribution to the debate from someone who was personally involved in it (as Deputy Chairman of the SBC). It is written in a vigorous and rather adversarial manner, and Titmuss shows scant respect for the arguments deployed by his critics - for example, whenever 'welfare rights' are referred to, quotation marks appear around the word 'rights' thereby casting doubt on their status. It makes few concessions and constitutes a robust defence of the *status quo* as it was at the time.

Titmuss' statement of the problem

The article begins by raising the following question:

'If all decisions involving social security justice to individuals were lined up on a scale with those governed by complete eligibility rules at the extreme left, those involving complete discretion at the extreme right and those based on a mixture of rules, principles, standards and discretion somewhere in the middle, where on the scale might the most serious and the most frequent injustice lie?' (Titmuss, p. 113)

Although it may seem rather odd that the question is posed in terms of injustice rather than in terms of justice, there is a fairly simple explanation for this - it is a virtual paraphrase of the opening paragraph of K C Davis' book *Discretionary Justice*⁴ which Titmuss cites. However, he only does so when it suits his own purposes because, although he does not point this out, Davis comes to exactly the opposite conclusion about the place of discretion in public administration. Another difference is that, for Davis, rooting out injustice is merely a starting point. In the opening chapter of his book, Davis' concerns are expressed in more positive terms:

'One major thesis of this essay is that the degree of discretion is often much greater than it should be. [However,] the problem is not merely to choose between rule and discretion but to find the optimum point on the rule-to-discretion scale.' (Davis, p. 15)

Titmuss argues that it would be hard to find anyone in Britain or in North America who would publicly support the principle of complete individualised discretion across the whole field of income maintenance. He might have added that very few people would support the principle of *total* reliance on the application of eligibility rules but he does not do so, claiming instead that this position is precisely where the arguments of those who champion welfare rights will lead.

Welfare rights and the welfare rights movement

Titmuss was not unaware of the major concerns of the welfare rights 'movement' but describes them in essentially negative terms, suggesting that

'[i]t is easier to say what the social rights movement is against rather than what it is for. It is against power, against the arbitrary, non-accountable exercise of power, against stigma, against charity as opposed to rights, against the use of discretion, against discrimination on grounds of age, sex, class, colour and religion, against moral judgements being made about claimants by social workers as well as administrators.' (Titmuss, p. 118)

Titmuss saw the welfare rights movement 'as part of the more general protest and liberation movement' (*ibid.*, p. 117) but also claimed that it was part of an unholy alliance with

'the modern Diceyists of the New Right who advocate negative income taxation and Speenhamland wage supplementation systems as the answer to the problem of minority poverty and as a means of radically reducing the role of government in the provision of services.' (*ibid.*, p. 114)

However, this is really little more than a rather shameful case of guilt by association. The fact that the welfare rights movement and the 'modern Diceyists of the New Right' were both critical of what Titmuss refers to as 'the so-called bureaucracy of the public welfare system' is less significant than the very different reasoning which underlay their opposition to it. The welfare rights movement advocated strong social rights as a component of citizenship and was opposed to the exercise of administrative discretion in welfare because it prevents people from exercising their social rights. The New Right, on the other hand, argued that social rights are not a legitimate component of citizenship because they can only be granted by interfering with other rights (in particular, property rights) which must be given priority. Although the New Right critics were opposed to the exercise of discretion in welfare, this was because they believed that the state should not be involved in the provision of welfare and they were even more opposed to the strengthening of rights to welfare, on the grounds that this would only make an already bad situation worse.

Although Davis does not use these terms, and I am borrowing the terminology from Jerry Mashaw's book *Bureaucratic Justice*,⁵ his reference to a 'rule-to-discretion scale' makes it clear that he regards rules and discretion as being *competitive* rather than *mutually exclusive*. The first of this pair of terms refers to a situation in which 'the more you have of the one, the less you can have of the other' while the second refers to one where 'if you have the one, you cannot have the other'. It is the competitive nature of the relationship between rules and discretion that makes it possible for policy makers to seek an optimum balance between them. However, it would appear that Titmuss only partially grasped this point. In asking where on the rules-to-discretion scale the most serious and frequent injustice lies and in concluding that it lies with 'legal rules', he is concerned to exclude that option altogether. Titmuss' incomplete grasp of the point arises, in large measure, from his use of the term 'legal rule', a composite term which conflates legal rights and bureaucratic rules. Davis is mainly concerned with bureaucratic (or administrative) rules and hardly (if at all) refers to legal rights but Titmuss runs into problems because, although he accepts

that rules and discretion are competitive, he appears to regard rights and discretion as mutually exclusive. The following quotation makes this clear:

‘It is assumed that justice will be advanced if case law is substituted for discretion; if all appeal systems are judicialised and claimants represented by lawyers; if all discretionary cash additions are abolished; if access to the courts is made available to all claimants; if the adversary system replaces the inquisitorial lay tribunal.’ (Titmuss, p. 118)

In this article, I am concerned both to show that rights and discretion are competitive and that the task for policy makers is also to seek an optimum balance between these two principles.

Although Titmuss’ claim that there was little empirical research on the administration of social security in Britain at that time on which he could draw was undoubtedly true, his reliance on research carried out in the USA is very problematic. This is because he attributed the worst excesses of the welfare rights movement in the USA, in particular what has been described as the ‘pathology of legalism’, to the welfare rights movement in the UK.

‘The increasing application of “legalism” (defined as an insistence on legal rules based on precedent and responsive only very slowly to rapidly changing human needs and circumstances) to the public assistance system has led, all over the United States, to a massive fragmentation of entitlement. Itemised legal entitlements in the assessment of needs and resources now embrace hundreds of visible articles and objects - practically everything that bedrooms, living-rooms, kitchens and lavatories may contain, most articles of clothing, day, night, summer and winter, for individuals of both sexes, all ages, and nearly all shapes and sizes.’ (*ibid.*, p. 125)

The clear implication is that agreeing to any of the demands of the welfare rights movement in the UK would be the thin end of the wedge. Thus, any attempt to accommodate their demands would lead inexorably to the somewhat bizarre situation which, according to Titmuss, already existed in New York City, where

‘a man had a “right” to possess one pair of winter trousers at \$7.50 (regular sizes); the household had a “right” to possess in the kitchen one can opener at 35 cents and in the lavatory one toilet holder at 75 cents “but only if the landlord does not have to give you one”. And so on, and so on through hundreds of itemised entitlements from scrub brushes to panties.’ (*ibid.*, p. 125)

According to Titmuss, the consequences had been far-reaching:

‘more concealed discretionary power not less (for example, in the assessment of itemised needs); more frustration, bewilderment and apathy among claimants as fair hearings become more esoteric; more inequitable treatment with the growth of itemised entitlements; more administrative inefficiencies and fewer “quality controls”; and more hostility and fear on both sides of the counter, not less.’ (*ibid.*, p. 125)

Clearly such a situation had to be avoided at all costs. And how could that best be achieved?

Titmuss’ Fabian solution

In line with the thinking of Fabian socialists⁶ and in accordance with the philosophy underlying the post-war welfare state (which assumed that the state was in the business of promoting welfare, that officials were all well-intentioned, that it was unnecessary to grant enforceable rights to individuals and that it was sufficient to impose duties on public authorities), Titmuss’ answer was that the best strategy for

achieving the right balance was to trust institutions like the Supplementary Benefits Commission 'to get it right'. This was most likely to promote the well-being of claimants and it was therefore important to keep at bay the rights culture, which undermined the service ethic, generated conflict and promoted selfish and acquisitive behaviour.

Richard Titmuss was a strong supporter of the public provision of social services on the grounds that they were needed to compensate for what he called the 'diswelfares' associated with the market. He also asserted the moral superiority of the collective values associated with public provision and believed that these values would eventually displace the individualistic values associated with the private sector and lead to the establishment of a socialist society. It was this philosophy and these values which led him not only to accept the invitation, from the Labour Government in 1966, to serve as Deputy Chairman of the Supplementary Benefits Commission but also, some years later, to mount a robust defence of the Commission against the attacks of the welfare rights movement. Although a social assistance scheme might seem a rather strange vehicle for propagating values which would eventually undermine and engulf the market, Titmuss' faith in the supposedly well-intentioned aims of the legislation, in the fact that it embodied the discourse of needs, and in the undoubted achievements of the Commission, convinced him that it was a worthy cause to defend. According to Titmuss (pp. 125-131), the Commission had achieved a number of important advances, for example it had:

- provided information (in the form of the widely available *Supplementary Benefits Handbook*) about the scheme and the ways in which discretion was exercised;
- reduced or eliminated unnecessary discretionary power (although, it must be said, no evidence is presented in support of this claim);

- developed quality controls e.g. the supervision of subordinates by superiors, checks by one officer over another, audit and inspection controls, random sample checking, administrative surveys, the analysis of statistical data, and commissioned research;
- continually clarified and updated administrative rule making;
- advocated more and better training, retraining, education and staff development programmes;
- recognised the need to reduce overcrowding, discomfort, psychological stress and overwork among staff, and to improve premises and facilities; and
- ensured that the pressures on the Supplementary Benefit scheme were reduced so that the exercise of discretion could lead to individualised justice.

Although this was clearly a 'top-down' view of the Supplementary Benefit scheme,⁷ and was at odds with the experiences of many claimants and the claims of many critics, Titmuss was concerned to ensure that what he regarded as the achievements of the Supplementary Benefits Commission should not be put at risk. Moreover, he believed that any concession to the demands of the welfare rights movement would have precisely this effect.

Prior to the publication of the *Political Quarterly* article, Titmuss' academic and political standing were both very high indeed but his dismissal of the arguments of his critics and his defence of the *status quo* lost him a good deal of support, both among students and among community and Labour Party activists, most of whom had previously regarded him with admiration and respect.⁸

Did Titmuss get it right? My provisional answer must be no, but in order to assess the strengths and weaknesses of his analysis, I want now to take a somewhat more

dispassionate look at the relationship between rules, discretion and rights. The challenge will be to do better.

PART 2: AN ALTERNATIVE APPROACH

The relationship between citizens and the welfare state can be understood as a contract, i.e. as a relationship of exchange between individual (legal) rights and collective (legal) duties. Rights to social welfare are conferred on individual citizens and duties to promote the collective welfare of the population are assumed by the state. These rights and duties are mediated through the administrative process.

Davis on rules and discretion

Where an administrative agency has discretion (which I shall refer to as *agency discretion*), it can structure its routine decision-making in a variety of ways: it can formulate a set of rules which express the intentions of policy makers or leave officials free to exercise their discretion. These two alternatives (which I shall refer to as *administrative rules* and *officer discretion*) can be represented as end points on a continuum: in practice most decision-making corresponds to some point between the two extremes.

In a rule-based agency, officials are expected to apply the *rules* to the facts of the case and have relatively little decisional space. The rules themselves (defined as general instructions which prescribe how individual cases should be dealt with) may deal with procedural as well as substantive matters. However, for a variety of reasons, a set of rules may not be formulated:

- the intentions of the policy makers may not be clear enough;
- the knowledge to formulate a set of rules may be lacking;

- the complexity and variety of individual circumstances may make it extremely difficult to formulate a set of rules;
- it may be regarded as preferable to consider each case on its merits rather than subsume it under some general rule.

In these circumstances, we can say that an officer has *discretion*. *Discretionary Justice* offers a helpful definition of this term

‘A public officer has discretion whenever the effective limits on his power leave [the officer] free to make a choice among possible courses of action or inaction.’ (Davis, p. 4)

Davis’ emphasis on the ‘effective’ limits of an officer’s power alerts us to the fact that discretion may be legal or illegal. Policy makers may have decided that officials should have a choice; alternatively, officials may be able to exercise a choice, e.g. by ignoring or bending the rules in circumstances where they are expected to apply them. His definition likewise makes it clear that discretion may apply to the choice between action and inaction, as well as between alternative courses of action. It can also apply to the finding of facts as well as the processing of these facts; it can cover procedural as well as substantive choices and can thus affect outcomes in a number of ways.

According to Davis, the problem is not to choose between administrative rules and officer discretion but, rather, to find the optimum point on the rules-to-discretion scale in the particular circumstances of the case. He believed that ‘[p]erhaps nine-tenths of injustice ...flows from discretion and perhaps only one-tenth from rules’ (*ibid.*, p. 25) and that achieving an optimal balance involved eliminating ‘unnecessary’ discretion and ‘confining, structuring and checking’ what discretion was left (*ibid.*, p. 4). However, it is important to stress that, in another context, achieving an optimal balance might have entailed increasing (rather than decreasing) the amount of

discretion exercised by officials to a more appropriate level. Davis' definitions of confining, structuring and checking are set out below:

- *confining* involves deciding how much discretion each official should have (higher-tier officials are often given more discretion than lower-tier officials);
- *structuring* involves developing standards or guidelines in order to influence and shape the exercise of discretion. (Note: education and training can also contribute to structuring); and
- *checking* involves ensuring that officials are held to account for their decisions and may involve (internal) administrative review; (external) appeals to courts, tribunals, or ombudsman; internal and external audit etc.

In Davis' view, 'discretionary justice' exists when an optimum balance is achieved.

Adding rights to Davis' account

Having outlined the relationship between rules and discretion, I want now to bring rights into the picture. Rights refer to enforceable claims and *legal rights* to legally enforceable claims. It is important to point out that although rights entail duties, the converse does not hold. Thus, if an individual has a legal right to something, it follows that some other individual (or institution) is under a legal duty to provide it. If, however, an individual (or institution) is under a *general duty*, e.g. to relieve the poor or help the needy, it does not follow that any poor or needy individual necessarily has a legal right to help. That will depend on the resources that are available and the priority given to that individual's claim.

Arguments for and against rules, discretion and rights

The main arguments for and against rules, discretion and rights are set out below:

For Administrative Rules

1. Rules lead to greater consistency
2. Rules ensure that like cases are treated alike

Against Administrative Rules

1. Rules can lead to rigidity unless they are continuously updated
2. Rules give too much power to the organisation

For Officer Discretion

1. Discretion allows for greater flexibility which facilitates creativity
2. Discretion enables cases that are not alike to be treated differently

Against Officer Discretion

1. Discretion allows for the exercise of moral judgments
2. Discretion gives too much power to individual officials.

For Claimants' Rights

1. Rights foster a greater sense of security and empowerment among claimants
2. Rights make decision-makers accountable for their decisions

Against Claimants' Rights

1. Rights promote conflict
2. Rights give too much power to claimants

Although different people will weigh up the arguments for administrative rules, officer discretion and claimants' rights in different ways, I suspect that many people will find *all* the positive arguments attractive and *all* the negative ones unattractive. I certainly do. The problem is that it is impossible simultaneously to maximise all the positive arguments and minimise all the negative ones. This is why an optimum balance has to be sought. However, it is not sufficient to seek an optimum balance between two of these concepts (rules and discretion) as both Titmuss and Davis attempt to do. An optimum balance needs to be struck between all three of them, i.e. between administrative rules, officer discretion and claimants' rights. To see how this might be done, I shall now refer to another seminal contribution to the subject, Jerry Mashaw's book *Bureaucratic Justice*.⁹

Mashaw's account of administrative justice

Mashaw defines *administrative justice* (equated with the justice inherent in routine day-to-day administration) in terms of

'those qualities of a decision process that provide arguments for the acceptability of its decisions' (p. 24).

i.e. the principles which can be invoked in seeking legitimation for the justice of the decision-making process.

In his study of the American Disability Insurance (DI) scheme, Mashaw detected three broad strands of criticism levelled against it: producing inconsistent decisions; failing to provide a good service; and failing to ensure 'due process' and respect claimants' rights. He argued that each strand of criticism is based on a different normative conception of the DI scheme, i.e. a different model of what the scheme could and should be like. These three models are *bureaucracy* (Mashaw refers to this as 'bureaucratic rationality'), *professions* (Mashaw calls it 'professional treatment') and the *legal system* (Mashaw's term is 'moral judgement').

Each model is associated with a different set of principles. Based on Mashaw's approach, we can associate a different mode of decision-making, a different legitimating goal, a different mechanism of accountability and a different type of remedy with each of the three models. These are set out below:

In a bureaucracy, decisions are made by applying rules, the legitimating goal is accuracy, accountability is hierarchical and upwards, ultimately to the head of the organisation, while remedies are achieved through (internal) administrative review. In a profession, decisions are made by applying knowledge, the legitimating goal is service, accountability is interpersonal and outwards (to other professionals) while remedies are achieved through complaints to the relevant professional body. In a

legal system, decisions are made by weighing up arguments, the legitimating goal is justice, accountability is to an independent body and remedies are achieved through appeals to a court or tribunal.

According to Mashaw, each of these models is also associated with a different conception of administrative justice. This is because, in each case, different principles are invoked to assess the acceptability of decisions. Thus one conception of administrative justice is based on the model of an organisation as a bureaucracy, another is based on the model of the organisation as a profession, and a third is based on the model of the organisation as a legal system. Mashaw argues that each of the three models is 'coherent and attractive' and that, in his terminology, they are *highly competitive* rather than *mutually exclusive* (*ibid.*, p. 23). Thus, these models can and do co-exist with each other. However, other things being equal, the greater the influence of one, the less will be the influence of the others. It follows that overall administrative justice, i.e. the justice inherent in day-to-day decision-making, can be understood as a trade-off between the different conceptions of administrative justice associated with each of the three models, i.e. with bureaucracy, professionalism and the legal system. Rather than being a question of 'all for one', it is more a matter of 'one for all' and Mashaw implies that this is the case not only for the American DI scheme but for social welfare organisations in general.

Although this approach is certainly attractive, it is very relativistic in that it implies that the administrative justice of an organisation depends on what kind of organisation it is. It is also rather prescriptive in its claims since it holds that these three, and only these three, models always need to be taken into account. The latter claim is questionable since, for example, a strong argument can be made that the new emphasis on managerialism in public administration represents an additional model which is in competition with the other three, and not merely a development of the old bureaucratic model.

Mashaw's approach enables us to see not only what trade-offs are made between the three models of administrative justice in particular cases, but also to consider what different sets of trade-offs might be more desirable. The trade-offs which are made reflect both the concerns of legislators and the bargaining strengths of the institutional actors who have an interest in promoting each of the models, typically civil servants and officials in case of the bureaucratic model; doctors, social workers, police officers, other professionals and 'street level bureaucrats'¹⁰ in the case of the professional model; and lawyers, court and tribunal personnel and groups representing clients' interests in the case of the legal model. The trade-offs will vary from one organisation to another and, within a given organisation, from one area of activity to another.

Bearing in mind the competitive relationship between Mashaw's three models of administrative justice, it is important to ask whether the overall justice inherent in routine decision-making could be increased through a different set of trade-offs from those which currently apply. This requires the exercise of judgement and, although there may be a consensus that some alternative state of affairs would be preferable, this will not always be so. In any case, whether or not such a state of affairs can actually be brought about will need to be taken into account.

In my view, this approach provides a more satisfactory framework for analysing the actual and potentially more desirable trade-offs between rules, discretion and rights, which not only draws attention to their organisational implications but also highlights their consequences for administrative justice. Using this framework, I want now to consider how the balance between rules, discretion and rights in social security has altered in the United Kingdom over the last 25 years.

PART 3: THE SHIFTING BALANCE BETWEEN RULES, DISCRETION AND RIGHTS IN SOCIAL SECURITY

The Reform of Supplementary Benefit in 1979

The position advocated by Richard Titmuss in 'Welfare "Rights", Law and Discretion' did not hold for long. Titmuss died in 1973 and, following the retirement of Lord Collison as Chairman of the Supplementary Benefits Commission in 1975, David Donnison, a colleague of Titmuss' who had also been a Professor of Social Administration at the LSE, was appointed to succeed him. Donnison came in from the outside and, unlike Titmuss, had no vested interest in the policies which had been developed by the Commission. He quickly embarked on a review of policy which concluded that much larger caseloads, the changing composition of the claimant population (in particular the substantial increase in the number of unemployed persons and single parents claiming Supplementary Benefit) and the greater assertiveness of claimants had combined to make it impossible to exercise discretion in a humane and sensitive manner.¹¹ In 1976, the Labour Government set up a review of the Supplementary Benefit scheme which concluded by advocating, *inter alia*, a new legislative framework for the Supplementary Benefit scheme in which statutory regulations would replace administrative discretion.¹² This was welcomed both by the welfare rights movement, one of whose main grievances was that supplementary benefit staff (and appeal tribunals) regularly used their discretion to deny payments to claimants and thus deprive them of their entitlements, and by the incoming Conservative Government, which argued that staff (and tribunals) used their discretion to make payments to claimants who did not really need them and who were 'playing the system'. Legislation, passed in 1980, introduced statutory rights to 'single payments' (for the purchase of essential items which claimants could otherwise not afford) and 'additional requirements' (designed to meet the higher recurrent expenses of claimants with greater needs). Adopting a 'top-down approach', the Government hoped that the existence of these rights would curb the generosity of staff and tribunals and strengthen their resistance to the special pleading of

unscrupulous claimants. Adopting a 'bottom-up approach', the welfare rights movement hoped that the existence of statutory rights would ensure that more claimants received their full entitlement to benefit. Thus, for entirely different reasons, the Government and the welfare rights movement found themselves supporting the same strategy.

The reform of social security in 1986

For a short while after the passage of the 1980 Social Security Act, the number of single payments declined quite dramatically and it looked as though the Government would achieve its objectives but, after a year or so, they began to increase again. The rise proved quite relentless and was met by a series of cuts in the items which could be provided through single payments.

Four years later, in 1984, the Government set up yet another set of reviews. On this occasion, they were not restricted to Supplementary Benefit but covered the most costly social security programmes in public expenditure terms. The stated aims of the reviews were to target limited resources on areas of greatest need (targeting), to make the social security system easier to understand (simplification) and to encourage greater individual self-reliance (through enhanced work incentives). However, it was clear to all concerned that the main aim was to devise means of capping or otherwise limiting the growth of public expenditure on social security. As far as Supplementary Benefit was concerned, the Government recommended its replacement by two schemes.¹³ Thus, the 1986 Social Security Act (which is currently in force) introduced a simplified Income Support scheme providing regular weekly payments of benefit 'as of right', and a cash-limited Social Fund providing loans and grants as 'one-off' extras on a discretionary basis. I should point out that, in the case of these grants and loans, the staff do not have complete discretion since their decisions are constrained by a comprehensive set of administrative rules, directions and guidance and by the cash-limited nature of the scheme.¹⁴ But, while claimants of Income Support can still appeal to an independent tribunal if they wish to challenge a

decision, those who apply to the Social Fund cannot. The only mechanism of redress open to them is to ask for the decision to be reviewed administratively. In considering the actual and potential trade-offs between rules, discretion and rights, we therefore need to consider these two parts of the social assistance scheme, i.e. Income Support and the Social Fund, separately from the rest of the social security system.

The dual system of adjudication

When 'Welfare "Rights", Law and Discretion' was published in 1971, there were two parallel systems of adjudication in social security.¹⁵ Under arrangements which can be traced back to the introduction of unemployment insurance in 1911, there was a three-tier system (or, more accurately, a 'three-tier plus' system) of adjudication for national insurance and related benefits. At the first tier, all non-medical, i.e. lay, questions were dealt with by National Insurance Officers (the forerunners of the present Adjudication Officers) while medical questions (most of which arose in relation to sickness/invalidity and disability benefits) were dealt with by general medical practitioners. Appeals against first-tier decisions were heard by National Insurance Local Tribunals (NILTs) and Medical Appeal Tribunals (MATs) - the former dealt with lay questions and the latter with medical questions. There was then a further appeal from NILTs and MATs on a point of law to the National Insurance Commissioners.

Although National Insurance Officers (NIOs) were civil servants, as far as adjudication was concerned they were expected to act independently in applying the law (statute law and case law) to the facts of the case. Thus, they were not answerable to management or to the Minister in Parliament for their decisions. NILTs comprised a legally qualified chairman and two lay members (one representing employers and the other trade unions) while the Commissioners were all experienced lawyers of at least 10 years standing. Their decisions constituted a set of precedents which had to be followed by NILTs and NIOs. Thus, they were, in effect, specialised administrative law judges. Finally, since all tribunals are supervised by the courts,

there was the possibility of a further appeal, on a point of law, from the Commissioners to the Court of Appeal (in England and Wales) or to the Court of Session (in Scotland) and ultimately to the House of Lords.

A wholly different model of adjudication applied to supplementary benefit. Under arrangements which can be traced back to the introduction of unemployment assistance in 1934, there was a simpler (and more attenuated) two-tier system of adjudication. At the first tier, decisions were taken by Supplementary Benefit Officers (SBOs). There was then a right of appeal to a Supplementary Benefit Appeal Tribunal (SBAT) whose decisions were final. SBOs were also civil servants and were expected to apply statute law and Commission policy (there was very little case law) to the facts of the case. SBATs also comprised three members but they had a lay chairman and could override Commission policy by substituting their own discretion for that of the SBO.

The contrast between the two systems was striking. In the case of Supplementary Benefit, the law gave considerable discretion to the Supplementary Benefits Commission. Although Commission policy was expressed in endless rules and regulations, officials nevertheless had a fair amount discretion in implementing policy. There were no precedents to be followed and SBATs functioned rather like case conferences. In National Insurance, officials had much less discretion in applying the law, tribunals were more like courts and Commissioners' decisions constituted a body of case law.

In terms of the framework set out in Part 2, rights (associated with a legal model of decision making) were much stronger in national insurance while discretion (associated with a professional model of decision making) was much greater in Supplementary Benefit. However, the bureaucratic model (associated with administrative rule-making in large government departments) was even more important in both cases. This was, in part, because of the limited availability of specialist advice and representation which are needed to enable claimants to enforce

their rights. In national insurance, the bureaucratic model exercised most influence over decision making, the legal model somewhat less and the professional model very little indeed. In Supplementary Benefit, the bureaucratic and, to a lesser extent, the professional model were dominant while the legal model was very weak.

As far as Supplementary Benefit was concerned, the 1980 legislation changed the position completely. As I explained in Part 1, the model of adjudication in Supplementary Benefit was subjected to sustained attack by the welfare rights movement for failing to protect claimants' entitlement to benefit, while the Supplementary Benefits Commission, and subsequently the government, concluded that the model was no longer viable. This was partly due to changes in the size and composition of the claimant population and to pressure from welfare rights activists but also reflected a lack of trust by claimants in officials who were being asked to exercise discretionary powers more suited to professionals. This model of adjudication was eventually abandoned in favour of the national insurance model which, for some years, applied to all social security benefits administered by central government. The status of the first-tier decision makers in Supplementary Benefit cases became as that of first-tier decision makers in national insurance cases, the composition and powers of SBATs became the same as those of NILTs and, in 1983, the two tribunals were merged into Social Security Appeal Tribunals. Moreover, during this period, some of the characteristics associated with the legal model were further enhanced. In 1984, all Adjudication Officers were made accountable to the Chief Adjudication Officer whose roles include advising AOs on the performance of their functions, discharging certain responsibilities relating to appeals to the Commissioners, and monitoring standards of adjudication.¹⁶ In the same year, responsibility for appeal tribunals was transferred from the Department of Social Security to an independent statutory body (now known as the Independent Tribunal Service) under a President (appointed by the Lord Chancellor after consultation with the Lord Advocate), who is responsible for the appointment and training of all tribunal personnel, and all tribunal chairmen were required to be lawyers of five years standing. Commissioners' decisions in supplementary benefit cases constituted a

body of case law with the force of precedent in exactly the same way as in other social security benefits.

In terms of the framework set out in Part 2, the extent of discretion (associated with the professional model of decision making) available to Adjudication Officers and Social Security Appeal Tribunals (whose responsibilities now embraced Supplementary Benefit as well as national insurance and related benefits) in Supplementary Benefit cases had clearly declined while that of rights (associated with the legal model) had been brought into line with that in national insurance and related benefits.

In 1986, the pattern of adjudication changed again. Supplementary benefit was replaced by a simplified Income Support scheme and a cash-limited, discretionary Social Fund. (The Social Fund is also responsible for a number of non-discretionary social security benefits, e.g. maternity and funeral payments, but since decisions about entitlement to these benefits are made by AOs and there is a right of appeal to a SSAT, there is no need to say more about this here.) In the case of Income Support, the pattern of adjudication which had formerly applied to all social security benefits administered by central government continued to apply. However, the cut-backs in home visits and the increased emphasis on postal applications for benefit weakened whatever influence the professional model may formerly have had. In addition, a new requirement that appeals to a tribunal had to be preceded, as a first stage, by internal administrative review, was introduced for a number of new benefits.¹⁷ This reduced the number of decisions which were reversed on appeal and weakened the legal model somewhat. At the same time, computerisation had the effect of further increasing the influence of the bureaucratic model which made further gains at the expense of both the professional and the legal models.¹⁸

The case of the Social Fund is altogether different.¹⁹ First-tier decisions are made by Social Fund Officers acting under the direction and guidance of the Minister. There is no right of appeal as such (if there had been, tribunals could have made decisions

which would have breached the cash-limits), although dissatisfied claimants can obtain a review of the decision in question. This is carried out first by the official who made the original decision and subsequently, after an interview with the claimant, by a senior member of the local office. Claimants who are still dissatisfied may request a further review by a Social Fund Inspector whose decisions are monitored by the Social Fund Commissioner.²⁰ Although the arrangements are rather complex, the important point is that there is no appeal from an initial decision to an independent appeal tribunal, or from there to a body like the Social Security Commissioners, no body of case law and no mechanism that is in any way analogous to the Chief Adjudication Officer. Thus the resulting balance between rules, discretion and rights (associated with bureaucratic, professional and legal models of decision making) is similar to that which applied in supplementary benefit before the 1980 reforms. In both cases, the bureaucratic model of decision making is dominant, the influence of the professional model is quite strong while that of the legal model is weak.

Implications for justice

The trade offs between the models in each of the periods referred can be summarised as follows. Between 1971, when Titmuss' article was published, and 1980, the bureaucratic model exerted the strongest influence on National Insurance, the influence of the legal model was also quite strong but the professional model was very weak. In Supplementary Benefit, the bureaucratic model likewise exerted the strongest influence but the influence of the legal model was rather weak while that of the professional model was much stronger. This is not to imply that National Insurance Officers (the forerunners of today's Adjudication Officers) were less 'professional' in the performance of their duties than Supplementary Benefit Officers (all the evidence would seem to suggest the opposite) but rather, to emphasise that the professional model of decision making (as outlined above) exerted much less influence over their work.

Between 1980 and 1986, the relative influences of the three models in National Insurance was unchanged. However, following the reform of Supplementary Benefit in 1980, in particular by the replacement of discretionary Exceptional Needs Payments by rights to Single Payments, and the assimilation of Supplementary Benefit to the system of adjudication and appeals in National Insurance, the establishment of the Independent Tribunal Service and the Chief Adjudication Officer, the influence of the legal model was considerably strengthened while that of the professional model was correspondingly weakened.

The reform of social security provisions in 1986 again had little effect on decision making and appeals in National Insurance. However, its effects on Income Support and the Social Fund, which replaced Supplementary Benefit, were considerable. Income Support was assimilated to National Insurance (in which the bureaucratic model exerted the strongest influence, the influence of the legal model was also quite strong but that of the professional model was very weak). However, the relative influences of the three models in the Social Fund was very different - that of the bureaucratic model was by far the strongest, that of the professional model quite strong while that of the legal model was rather weak. Thus the relative influence of the three models on the Social Fund resembled their influence on the Supplementary Benefit scheme in the early 1970's when Titmuss wrote his article.

PART 4 : THE CONSERVATIVE GOVERNMENT'S PROPOSALS

In the final section of this paper, I want briefly to summarise the Consultation Paper *Improving Decision Making and Appeals in Social Security*²¹ which was published by the Department of Social Security in July 1996, and then to subject the suggested reforms (some of which have already been implemented) to critical scrutiny.

The case for reform

The case for reform set out in the body of the Consultation Paper is not particularly compelling in that the arrangements which it seeks to change have existed for many years and have neither been regarded as problematic nor in need for reform. The real case is to be found in Appendix G which reproduces the speech in which Peter Lilley announced the Department's '*Change Programme*'. Although administrative costs only account for some 4-5% of the total social security budget, the sums involved (£3-4bn per year) are very substantial and, in an attempt to rein them in, Peter Lilley announced measures designed to achieve administrative savings of 25% over three years. It is said that these savings were demanded by the Treasury and that even Peter Lilley, who was known to be especially enthusiastic about public expenditure cuts, regarded them as excessive. Standards of adjudication, which currently leave a great deal to be desired (the Consultation Paper acknowledges that 22% of income support decisions were inaccurate in 1994/95), are bound to deteriorate further as the result of these 'efficiency savings'. However, instead of recognising that this constitutes a strong argument for strengthening appeal procedures, the Secretary of State has decided that the Independent Tribunal Service, which in spite of its independence from the Department of Social Security is financed by it, should bear its share of the cuts.

The aims of the 'new' approach which are set out in the Consultation Paper are

'[t]o improve the processes for decisions and appeals; to produce a less complex, more accurate and cost-effective system for making and changing decisions; and to preserve customers' rights to an independent review of decisions in appropriate cases' (para 1.2).

Although these aims may, at first sight, seem quite uncontentious, many of the proposals are very controversial.

In relation to first-tier decision making, the Consultation Paper recommends the use of simpler and better-designed claim forms; clearer rules and guidance about the

evidence needed to support claims to benefit; an increased emphasis on direct contact with claimants, better explanations for decisions and improved computer support (para. 1.3).. These are all worthwhile reforms, but in light of the planned cuts in expenditure on the administration on benefits, it is hard to see how some of these worthwhile reforms, in particular more direct contacts with claimants (now known as 'customers'), will be paid for.

The Consultation Paper also recommends that claimants who do not provide the evidence which can reasonably be sought from them should be penalised, e.g. by postponing the date on which they become entitled to benefit until they produce it (para. 4.8). However, such a measure is bound to hit the most vulnerable claimants, e.g. those with learning difficulties or mental health problems, those who are socially disadvantaged or have a poor command of English.

In relation to accountability, the Consultation Paper proposes that first-tier decision makers, who are managerially accountable to the Minister and accountable to the Chief Adjudication Officer in respect of adjudication, should be accountable to the Minister alone (para.4.9). Their status would not be prescribed in law and the system of dual accountability, which appears to have worked well since it was established in 1911, would be ended. Moreover, in transferring the functions of the Chief Adjudication Officer to the Chief Executive of the Benefits Agency, which is currently responsible for the delivery of social security benefits (para. 4.14), all the advantages of an independent check on standards of adjudication would be lost.

The Consultation Paper also outlines a series of reforms to the appeals process. Only cases which need to proceed to appeal would do so; the appeal would cover only the issue in dispute rather than the whole decision; and would refer to the date on which the decision appealed against was made, rather than the date of the appeal hearing as at present (para. 5.4). Cases would be sifted to decide how they should be handled; the range of expertise available to and the composition of tribunals would not be prescribed; legal expertise would be reserved for 'appropriate' appeals with others

being heard by non-legal decision makers; single decision makers would hear most cases with two or more decision makers 'only as necessary' (para. 5.5). In addition, and this is one of the provisions which has already been put into effect, there would be a specific statutory provision for 'paper hearings', i.e. hearings dealt with on the papers alone, where appellants do not opt for an oral hearing (para. 5.6). There is, of course, nothing new about hearings which are dealt with on the papers alone - cases where appellants do not appear and are not represented are all too frequent. However, most tribunals find such cases very satisfactory and it is most unlikely that there would be much support for proposals which are intended to produce more of them.

The Consultation Paper ends by inviting comments on an appropriate model for decision making and appeals in social security for the future. The proposals, if put into effect, would radically alter the existing settlement, i.e. the delicate balance between bureaucratic, professional and legal considerations and between the interests of management, staff and claimants. Waiting in the wings is the alternative model of internal (administrative) review found in the Social Fund where there is no appeal to an independent appeal tribunal. This is commended for achieving 'independence' and 'public accountability' (para. 6.14), and it is no secret that this was the former Secretary of State's (Peter Lilley) preferred option for the entire social security system.

Implications for justice

How appropriate are the stated aims and how likely is it that these proposals will achieve them? Although the Consultation Paper is undoubtedly correct in emphasising the importance of getting decisions right in the first place, the need to produce 'efficiency savings', the abolition of the independent check on standards of adjudication and the weakening of the appeals procedure all suggest that the quality of decision-making is likely to deteriorate further rather than improve.

It is significant the stated aims refer to the preservation of 'rights to an independent review' rather than to 'rights of appeal' because, for many claimants, the latter would clearly not be preserved. Moreover, it is far from clear that review procedures, such as those which currently exist in relation to the Social Fund, can ever be truly independent. It is also significant that the rider 'in appropriate cases' has been added. This presupposes that such cases can be identified in advance, but experience suggests that this is extremely problematic and likely to be very difficult to achieve in practice.

One of the major virtues of the existing arrangements for decision making and appeals is that the system of independent adjudication, which includes the right of appeal to an independent tribunal, provides a measure of protection for those who are dependent on social security which compares favourably with that provided by lawyers and the courts for private forms of property²². This is not to suggest that everything in the garden is rosy – far from it - or that there is no scope for improvements which would enhance the justice inherent in the administration of social security. However, far from enhancing administrative justice, the Government's proposals are virtually certain to diminish it, and to do so quite substantially. Although the influence of the professional model, in particular the role of administrative discretion, has been 'squeezed out' of most social security benefits, it still exists in the Social Fund. But the influence of the legal model, and thus of claimants' rights, would, if the proposals are implemented, be weak across the board. The already dominant position of the bureaucratic model would be strengthened even further and the undoubted advantages associated with the legal model of decision making would be lost.

Every reform produces winners and losers. With a much greater emphasis on characteristics associated with the bureaucratic model of decision making and a greatly reduced emphasis on those associated with the legal model, the winners will be the Government and the Benefits Agency who will be able to dispose of cases more quickly and thus more 'cost effectively', while the losers will be claimants who will lose the protection that an independent system of adjudication provided for them.

This conclusion is supported in the Consultation Paper by the claim that ‘the customer views speed as being at least as important as accuracy’ (para. 6.3).

CONCLUSION

The framework developed in Part 2 of this article enables us to understand the shifting balance between bureaucratic rules, administrative discretion and claimants’ rights in social security and to criticise the proposals in the Consultation Paper in a way that Titmuss’ analysis in ‘Welfare “Rights”, Law and Discretion’ does not. In my view, this is partly because Titmuss confused and conflated bureaucratic rules and claimants’ rights, partly because he failed to distinguish officer discretion from agency discretion, and partly because he was too personally involved in the debate. Thus, in this instance, Titmuss did not get it right. Whether he would have approved of the proposals in the Consultation Paper is, of course, hard to say. More importantly, perhaps, the fate of those proposals is hard to predict.

Following the publication of the Consultation Paper in July 1996, Dr Roy Sainsbury, an experienced and very well-respected socio-legal researcher in the Social Policy Research Unit at the University of York, was commissioned by the government to analyse the submissions of organisations and individuals who responded to the proposals it contained but his report has not yet been published. However, it is well known that the proposals outlined in the Consultation Paper were not given a very favourable reception, either from the Independent Tribunal Service or from organisations representing claimants, and it may be assumed that the results of consultation will not provide much support for them.

Since the publication of the Consultation Paper, there has, of course, been a change of government. Although the new government has not yet revealed its position, the inclusion of a Social Security Modernisation Bill in the Queen’s Speech suggests that it is unlikely that all the proposals favoured by the Conservatives will be dropped by

Labour and probable that they will be taken forward in some form. However, we shall have to wait and see.

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CHAPTER 7

THE PROPOSALS IN THE CONTEXT OF THE DSS CHANGE PROGRAMME

In order fully to understand the provisions of Part I of the 1997 Social Security Bill, it is helpful to view them in historical perspective, in the light of current operational developments in social security, and in the context of contemporary initiatives in other, cognate policy areas. In the first instance, as Tony Bradley shows in his contribution to the book,¹ they involve a fairly radical break with the past, in the second instance, as I hope to demonstrate, their origins can be traced back to the DSS pressure for substantial administrative savings, and, in the third instance, as Hazel Genn argues in her contribution,² they involve some rather dubious analogies with the reform of civil justice.

The case for reform set out in Chapter 3 of the Green Paper³ is not particularly compelling in that the arrangements which it seeks to change have existed for many years and have neither been regarded as problematic nor in need for reform. The real case is to be found in Appendix G which reproduces the speech made by the then Secretary of State, Peter Lilley, in February 1996 in which he described the Department's 'Change Programme'. Although administration costs as a proportion of benefit expenditure have been reduced year on year since 1990/91 – falling from 5.7 per cent in 1990/91 to 4.3 per cent in 1996/97 – and compare well with private sector financial institutions,⁴ the sums involved (£3.4 billion in 1996/97) are very substantial. It is therefore understandable that they should be seen as a target for savings.

Arguing that substantial cost savings cannot be produced just by cutting back on routine activities or working harder, Peter Lilley concluded that a large 'step change' was required.⁵ Drawing inspiration from (certain unnamed) businesses which, he claimed, had improved their productivity by '20, 30 even up to 50 per cent' in very short periods of time, he concluded that the Department should 'aim to absorb both inflationary increases in pay and costs and increasing workloads' through increasing

productivity by 25 per cent over the next three years. It is said that these savings were demanded by the Treasury and that even Peter Lilley, who was known to be especially enthusiastic about public expenditure cuts, regarded them as excessive. Whether or not that is so, they became Government policy.

To indicate how these savings could be achieved, Peter Lilley set out seven 'propositions':

Proposition 1: Too many current procedures are rooted in the past clerical world.

Proposition 2: Benefit entitlement rules are often outdated, inconsistent between benefits and more complex than necessary.

Proposition 3: Laying down procedures in law is a barrier to efficient customer service.

Proposition 4: It costs less to get things right first time than to check, revise and repeat work done wrong initially.

Proposition 5: We need the information just once.

Proposition 6: We should pay people not to perform processes but to achieve results.

Proposition 7: The ethos of public service is essential but state monopoly of provision is not.

As far as social security is concerned, some of these propositions are new while others are rather long in the tooth. Examples of the former are Propositions 3, 4, 6 and 7; examples of the latter are Propositions 1, 2 and 5 which provided the rationale for the 'Operational Strategy', the name given to the ambitious programme to computerise the UK social security system over the last ten to fifteen years. In return for substantial Exchequer funding, the DHSS, as it then was, undertook to improve operational efficiency and reduce administrative costs; to improve 'quality of service' to the public by treating 'customers' in a less compartmentalised way and more as 'whole persons' with a range of social security business to transact; and to modernise and improve the work of social security staff.⁶ Although these aims were to be achieved by using information technology to promote a 'user-friendly' assessment of claimants' needs; by simplifying the eligibility rules, standardising the

conditions of entitlement, and developing a single claimant data base, we are now being told, in so many words, that the critics⁷ were right and these aims were not achieved at the time. If they had been, we might not be in the position in which we find ourselves today.

Just as some of the propositions are new while others are less so, so some of them are uncontentious while others are more controversial. In my view, examples of the former are Propositions 1, 2 and 5 (which were referred to above) and Proposition 4 (which is particularly important); examples of the latter are Propositions 3, 6 and 7. It is surely preferable for all concerned to get decisions right first time than to 'check, revise and repeat' decisions which were wrong initially. However, the proof of the pudding is in the eating and the *Change Programme* is best judged not in terms of the propositions themselves but, rather, in terms of the measures which were proposed to give effect to them. As far as Propositions 3, 6 and 7 are concerned, brief reflection indicates that each of them is extremely problematic. If importance is attached to procedural justice, then procedures must be prescribed in legislation; it is far from clear that competitive tendering is applicable to the administration of social security; and it is likewise not at all obvious that the ethos of public service can be maintained if the administration of social security is privatised.

Under the *Change Programme*, the stated aims of the Department were to:

- concentrate on its core tasks, cutting out non-essential work and costs;
- redesign its business processes to cut out wasteful work;
- introduce new computer systems which will enable the Department to capture new information once;
- use the private sector where this will generate investment and increase efficiency;
- change its incentives and funding of Agencies and local managers;
- reduce staff numbers;
- improve the jobs of the remaining staff;
- reform the structure of decision-making and appeals.

In pursuit of these aims, the Department has cut out a number of its former activities. Thus, for example, *Freeline*, the benefits advice line, was closed in July 1996; the ethnic minority language helplines have likewise been wound up; mobile advice centres have been withdrawn in many areas; and 'outreach services' have been closed and replaced by a telephone service. Within one month of closing *Freeline*, the DSS set up a National Benefits Fraud Hotline and, soon afterwards, launched a series of local anti-fraud initiatives known as *Spotlight on Benefit Cheats*. One must assume that anti-fraud measures are regarded as core tasks whereas the provision of information and advice are 'non-essential' activities.

Overall the Department reports a substantial improvement in productivity. Although some of this improvement can, no doubt, be attributed to improved work practices and the greater use of information technology, much of it is attributable to staff losses and it is hard to see, at least in the short run, how these staff losses, especially if they are considered alongside reductions in the provision of information and advice, will ensure that officials get decisions right first time (Proposition 4 above). It is more than likely that they will have the opposite effect.

Standards of adjudication still leave a great deal to be desired. Thus, the Green Paper acknowledges that 22 per cent of Income Support decisions were inaccurate in 1994/95 and this gloomy picture is confirmed by the latest Annual Report of the Chief Adjudication Officer.⁸ Although there were 'swings and roundabouts' and the Chief Adjudication Officer acknowledges the difficulty of weighing improvements in some areas with lowered standards in others, he concludes that 'the case for concern remains.' That this is so may be illustrated by citing a few examples. Thus, the report highlights a significant increase in the error rates for Disability Working Allowance where adjudication errors were detected in 68 per cent of cases compared to 16 per cent in the previous year and for Family Credit where the error rate went up from 23 to 35 per cent. Perhaps more significantly, although error rates in Income Support changed little over the period, errors were detected in 45 per cent of new and repeat claims, 34 per cent of reviewed decisions and 58 per cent of appeal submissions. In the case of new and repeat claims, the error rate varied from 27 per

cent and 70 per cent in different Area Directorates; in appeal submissions, 43 per cent of the cases examined were 'fundamentally flawed', mainly because the submission supported an incorrect initial decision or failed to fully and effectively argue the case.

Most of the measures announced by the previous government, for example, reviewing work processes, simplifying benefit rules, developing new information systems and exploiting information technology, and devising a new framework for allocating funds and measuring performance, cannot possibly produce short-term savings. The same is true of the intention to involve the private sector in the ownership and management of the DSS estate and in the delivery of services, not least because the present Government is proceeding more cautiously. In any case, the savings which are likely to be made here are likely to be somewhat less than previously envisaged because the present government intends to set minimum quality of service thresholds for private contractors. Thus, the 25 per cent savings in administration costs, and the inevitable cuts in service which must follow, are almost certain to lead to a further deterioration in adjudication standards. However, instead of recognising that this constitutes a strong argument for strengthening the independent monitoring of standards by the Central Adjudication Service and the existing system of adjudication and appeals, the previous Government decided to abolish the former and weaken the latter and the present Government has decided to follow suit. In so doing, 'New' Labour has not only decided to adopt an extremely contentious and partisan Conservative measure but has also chosen to ignore the results of the consultation exercise which revealed a widespread lack of support for it.

Just why the present Government has chosen to press ahead with the Bill is very unclear, especially since its own estimate of the savings resulting from the reform of decision making and appeals is a mere £50 million per annum 'over the longer period', a paltry sum when compared to the £3.4 billion it currently spends on the administration of social security and one which is, in any case, within the margins of

error and may well not be achieved in practice. In any case, it would have been a small price to pay for maintaining a set of accumulated procedural rights which have been one of the very few compensations for the parallel decline in benefit levels in recent years. Although the provisions in Part I of the Social Security Bill can be traced back to the DSS pursuit of substantial administrative savings, the measures proposed can neither be explained nor justified in terms of the contribution to this end.

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CHAPTER 8

LAY TRIBUNAL MEMBERS AND ADMINISTRATIVE JUSTICE

There is far less uniformity among the sixty or so different types of tribunal which fall under the supervisory jurisdiction of the Council on Tribunals than there is among the civil or criminal courts. Indeed, as Genn has argued,¹ it is almost impossible to provide a simple definition of a tribunal. The label is given to so many different kinds of bodies with such widely different functions, covering a vast range of subject areas including private as well as public law issues. In addition, as she points out, 'there is no common procedure ... and no common appeal process or appellate body. Some tribunal decisions are appealable to ministers, and others to courts and other tribunals. Many tribunals are composed of legal and lay members although some tribunals are comprised of a single individual without legal qualifications, some have members with specialist qualifications relevant to the particular jurisdiction. Some tribunals act in a strictly judicial fashion while others look more broadly at policy considerations'.

TRIBUNALS AND COURTS

Nevertheless, tribunals are frequently contrasted with courts. Of course, some tribunals, like employment tribunals, have many court-like characteristics while some courts, like small claims courts, resemble tribunals. Nevertheless, tribunals are not only regarded as different from courts but also as better than courts, at least for handling certain types of disputes. In some cases, they involve disputes between one individual and another where the involvement of the courts is strongly resented by one side. The clearest example here is that of disputes between employers and employees where allegations of class bias by the judiciary would have deprived the courts of their legitimacy. But, in most cases, they involve disputes between the citizen and the state which have become increasingly common as the state has assumed more welfare and regulatory functions. Tribunals are cheaper than courts, in part because legal aid is, with one or two exceptions, not available and in part because payments to tribunal chairmen and members are considerably less than the

salaries paid to judges in the civil courts. Considering the volume of cases which are heard by tribunals, this is not a trivial consideration. But, in addition, tribunals have other characteristics which, it is widely believed, give them advantages over the courts. According to the Franks Report, these are, in addition to cheapness 'accessibility, freedom from technicality, expedition and expert knowledge of their particular subject'.² Whether these alleged advantages are delivered in practice has, of course, been called into question. Prosser has argued that 'tribunals were not established to make up for defects in the judicial system. The choice was never between appeal to tribunals and appeal to the courts, but between appeal to tribunals and no appeal. Their introduction did not represent an incorporation of the idea of legality into new areas of society for its own sake. The provision of a formal right of appeal ... was introduced as a counter measure to political protest and as a means of making oppressive changes in the relief of poverty more palatable by giving a symbolic appearance of legality while ensuring that this had no real effect'.³ While the reference at the end of this quotation undoubtedly fits the establishment of tribunals under the Unemployment Assistance Act of 1934 better than the tribunals established under the National Insurance Act of 1911, the general point that tribunals have been preferred to the courts on political and cost grounds rather than because it is believed that they provide better access to justice is one that must be taken seriously.

THE EFFECTIVENESS OF TRIBUNALS

The effectiveness of tribunals in providing a check on first-instance administrative decision making has, in recent years, been the subject of a number of empirical studies. Two of these, Genn and Genn's *The Effectiveness of Representation at Tribunals*⁴ and Baldwin, Wikeley and Young's study *Judging Social Security*⁵ both involved social security appeal tribunals, although in the former case they were compared with three other types of tribunals (immigration adjudicators, industrial tribunals and mental health review tribunals) while in the latter case, they were studied against a background of research on adjudication in local offices and internal reviews of first instance decisions. Since social security appeal tribunals hear more

appeals than any other administrative tribunal, the research clearly has wide-ranging implications for tribunals in general.

According to Genn, tribunals are relatively ineffective because, even when a relatively straightforward mechanism of appeal exists (as it does in the case of social security), most people do not use it because they assume that the original decision was 'correct' or that it is unlikely to be changed. Although this research confirmed that tribunal procedures are generally more flexible and straightforward than court hearings, the nature of tribunal adjudication means that those who appear before tribunals without representation are often at a serious disadvantage. Thus, in the 1,115 social security cases sampled, the presence of a skilled representative increased the likelihood of a successful appeal from an average of 30% to about 48% after controlling for other factors. Genn goes on to argue that the shortcomings of tribunals as effective checks on administrative decisions are the result of 'misdescription of procedures as informal and misconceptions about simple decision making and [about] the scope for unrepresented appellants to prepare, present and advocate convincing cases' because the issues dealt with are often highly complex in terms of both regulations which are to be applied and the factual circumstances of the appellants. She concludes that, if tribunals are to provide an effective check on administrative decision making, and a means of achieving administrative justice, their deficiencies need to be addressed and explicit attention needs to be given to achieving a better balance between procedural simplicity and legal precision.⁶

THE ROLE OF LAY MEMBERS

According to Baldwin, Wikeley and Young, the phasing out of lay chairmen in 1984 has resulted in a more professional approach to the conduct of appeals and chairmen now have much clearer sense of their purpose and direction. However, their research revealed how chairmen marginalised lay members by assuming a dominant role in tribunal proceedings. This is really unsurprising since legally-qualified chairmen enjoy many advantages over lay members – in addition to their legal backgrounds, they receive more and better training and acquire greater experience by sitting more

frequently. Few of the tribunal members observed said very much - less than a fifth of the members observed in their study of 337 appeals made more than a limited contribution to the proceedings and almost half were completely silent throughout. Moreover, they frequently failed to participate actively in the deliberations following a hearing. In 331 of the 337 cases, the decision was unanimous and in the six where there was disagreement, the chairman was in the majority. In other words, there was not a single case in which the chairman was outvoted by the lay members. Members most commonly saw their job in terms of looking after the interests of the appellant and few saw their role in judicial terms - being impartial and applying the law. However, following the curtailment of discretion following the 1988 Social Security Act, the application of common sense' and the lay person's 'benevolent' approach are no longer what is required at social security appeal tribunals. It is rather the rigorous and impartial application of the law combined with an objective assessment of the evidence. Baldwin, Wikeley and Young conclude that 'the issues in most social security appeals are too legal, too technical and too complex to allow the average lay member much scope to make a significant contribution' and that 'the relatively low level of training that members receive has proved insufficient to equip them for the task of adjudicating on a complex body of law'. However, they are of the view that lay members can act as useful back-stops, asking supplementary questions and picking up points the chairman has missed. Moreover, in certain types of case, for example where the issue is whether someone has 'just cause' for voluntarily leaving a job, 'the lay person's experience and considered judgement of evidence may be more relevant than the chairman's expert knowledge of the law'. Lay members can often use their local knowledge and experience to suggest sources of help which are of assistance to appellants and can provide chairmen with the opportunity to discuss their view of the case before coming to a decision. Thus, they concluded that 'the potential remains for them to play an important role at tribunal hearings' but that this would only be achieved if attention was paid to recruitment and training.⁷ The present arrangements for selection and monitoring do not result in the appointment of the most able or most suitable people in the community and training has not enabled those who have been selected to maximise their input to tribunal proceedings.⁸

THE REMOVAL OF LAY MEMBERS FROM SOCIAL SECURITY AND CHILD SUPPORT APPEAL TRIBUNALS

Against this background, how should we assess the fact that, almost unnoticed, the long tradition of lay involvement in appellate decision making in social security has recently been brought to an abrupt end by the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Whether it is best understood as a logical outcome of the introduction of legally qualified chairmen and the increasingly tight regulation of social security provisions or to the relatively low level of training which members have received or to the government's overriding concern with promoting efficient administration, the central question ought to be whether the change will promote administrative justice for those who, for one reason or another, are dependent on social security? Will it give rise to a better balance between procedural simplicity and legal precision and enable tribunals to provide a more effective check on what the government itself refers to as 'the significant number of decisions taken by the Department [of Social Security] which are incorrect'?⁹

Under section 40 of the Social Security Administration Act 1992, the President of the Independent Tribunal Service was required to appoint panels of lay persons to act as members of social security appeal tribunals, the panel for an area comprising 'persons appearing to the President to have knowledge or experience of conditions in the area and to be representative of persons living or working in the area' and, under section 41, a duly constituted tribunal consisted of a legally qualified chairman (who could either be the President, a full-time chairman appointed under section 51 or a person drawn from the panel of part-time chairmen appointed by the Lord Chancellor or, in Scotland, the Lord President), *sitting with two lay members*. These provisions were both amended by the Social Security Act 1998. Under section 6 of the 1998 Act, the Lord Chancellor is required to appoint a (single) panel of persons and, under section 7, an appeal tribunal is to consist of a chairman *sitting with one or two members drawn from the panel*. At least one of the tribunal members must be legally qualified and, in cases of special difficulty, one or more of the members may have special expertise. In spite of the fact that the qualifications of tribunal members were

to be prescribed in regulations, no-one anticipated that these legislative provisions would result in the demise of lay members.

However, following parliamentary assent to the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which set out the composition of tribunals according to the benefit and the issues raised in the appeal, this is precisely what has happened. In broad terms, the composition of tribunals considering disability issues (the former disability appeal tribunals) will be unchanged; those considering industrial injuries and severe disablement allowance (the former medical appeal tribunals) will consist of a legally qualified panel member and one medically qualified panel member (rather than two as hitherto); while SSATs hearing incapacity benefit cases will comprise a legally qualified panel member and a medically qualified panel member (the former medical assessor becoming a member of the tribunal). All other appeals, which according to recent DSS estimates may account for 50% of the total,¹⁰ will be considered by a legally qualified panel member *sitting alone* although, in exceptional cases, a tribunal may now include a financially qualified panel member, i.e. an accountant. For child support appeal tribunals (CSATs) and SSATs hearing cases other than those involving incapacity benefit, the new arrangements were to be phased in over a six-month period. Since 1st June, all child support appeals have been heard by a legally qualified member sitting alone and after 30th September, the same will apply to 'mainstream' social security appeals. The appointments of existing lay members, most of which expire on 30th September 1999, will not be renewed and the lay panels will then cease to exist. Thus, a tradition of lay involvement in appeals, which can be traced back to the courts of referees which heard appeals under the National Insurance Act 1911, will come to an end and three person tribunals will cease to exist in social security.

A POLICY U-TURN

A very different outcome was envisaged when the previous government embarked on its review of decision making and appeals three years ago. The Government's first thoughts were published in October 1996 in a Green Paper, entitled *Improving*

Decision Making and Appeals in Social Security,¹¹ which included a series of possible reforms to the appeals process. Cases would be sifted to decide how they should be handled; the range of expertise available to and the composition of tribunals would not be prescribed by statute; legal expertise would be reserved for 'appropriate' appeals with others being heard by non-legal decision makers; and single decision makers would hear most appeals with two or more decision makers sitting 'only as necessary.' In addition, and this provision was quickly enacted, there was to be a specific statutory provision for 'paper hearings', i.e. hearings dealt with on the papers alone, where appellants do not opt for an oral hearing. The Green Paper invited comments not only on the merits of the proposals outlined but also on the most appropriate model for dealing with appeals against first-tier decision making.¹² Respondents were asked to assess the strengths and weakness of six organisational models which, in addition to the existing model, included models derived from the Social Fund, the Irish Social Security System and the Land Registry, none of which contain any judicial appointments. One of the main points at issue was not whether lay involvement in appellate decision making should continue but rather whether lawyers should continue to have an input into the appeals process.

A total of 437 organisations and individuals responded to the Green Paper and, at the end of the three-month consultation period, an academic consultant was commissioned to analyse these responses. The consultant's report was submitted to the Department of Social Security in February 1997 but distribution was held up by the impending election. The proposals for reforming the way in which cases are dealt with by tribunals attracted more criticism than support by a factor of about two to one - 51% of the 117 respondents who commented on this proposal were against more flexible appeal arrangements, 29% were for and 20% were broadly neutral. There was considerable support for retaining the current composition of tribunals and little enthusiasm for the proposal to reserve legal expertise for 'appropriate' cases - among the 80 respondents who commented on this proposal, 88% were in favour of the status quo, 9% were in favour of change and 4% broadly neutral - a return to non-legal decision-makers being seen as an undesirable and retrograde step.¹³

In spite of the fact that the Green Paper had been prepared by the previous Government, the new Government adopted almost all the measures proposed in it and seemingly ignored the results of the extensive consultation exercise. Soon after the General Election in May 1997, the new Secretary of State announced the imminent publication of a Social Security Bill, which appeared two months later in July 1997.

THE 1997 SOCIAL SECURITY BILL AND ITS AFTERMATH

Under the provisions of Part 1 of the 1997 Social Security Bill, the Government sought to abolish both the requirement that appeals relating to social security and child support had to be heard by a three-person tribunal and the requirement that tribunal chairmen had to be lawyers of standing. In spite of opposition from (among others) the welfare rights lobby, the Independent Tribunal Service and Liberal Democrats on the Standing Committee, there was little opposition to these provisions in the House of Commons. Opposition to the Bill from Labour members focused on other contentious provisions, most notably those affecting single parents in Part 2 of the Bill, and the radical shake-up of decision making and appeals envisaged by the Bill attracted little criticism.

By contrast, the two proposals referred to above encountered considerable opposition in the House of Lords and, in an effort to secure the passage of the Bill, the Government agreed to an amendment proposed by Lord Archer of Sandwell, Chairman of the Council on Tribunals, which ensured that at least one member of an appeal tribunal (but not necessarily the chairman) would be legally qualified. However, the Government refused to accept a second amendment designed to ensure that all appeals would continue to be heard by three-person tribunals. Thus, although some appeals would be heard by a one person 'tribunal', that person would have to be legally qualified.

In President's Circular No. 14, issued in May 1998, Judge Michael Harris made it clear that, from the date on which the Act was passed (21 May 1998), SSATs would,

with three exceptions, continue to comprise a legally qualified chairman and two lay members. The three exceptions covered applications to set aside under Regulation 10 of the Social Security (Adjudication) Regulations 1995; paper determinations where appeals are determined on the written representations of the parties; and where one or both the lay members cancel in advance or fail to arrive on the day and appeals. In these cases, appeals could be, and, in practice, have been heard by a legally qualified 'chairman' sitting alone.

Four months later, in September 1998, the President issued another circular dealing with tribunal composition. In President's Circular No. 16, Judge Harris added two further exceptions to the three referred to above. As from 28th September 1998, corrections of accidental errors under Regulation 9 of the Social Security [Adjudication] Regulations 1995 and appeals over whether a person satisfies the all work test could also be heard, and, in practice, have been heard by a legally qualified 'chairman' sitting alone.

Finally, in May 1999, the declining role of lay members was brought to an abrupt end. In President's Circular No. 17, Judge Harris announced that all appeals heard by a CSAT or a SSAT, including those covered by President's Circulars No. 14 and No. 16, may be, and, it may be safely assumed, will be determined by a legally qualified 'chairman' sitting alone. In the course of two years, the pendulum had swung away from the provisions in the 1997 Social Security Bill, which would have removed the legal input into appeal tribunals, to those in the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which have ended lay participation in tribunal decision making and, in most cases, left this in the hands of legally qualified 'chairmen' sitting alone. This outcome is not at all what those who opposed the provisions in the Bill had in mind.

PROCEDURAL PROBLEMS

The government may well have elected to proceed via statutory instrument because the parliamentary timetable precluded the possibility of realising its policy objectives

by means of primary legislation. If this is the case, it would be understandable although that would not make it acceptable. Statutory instruments are appropriate in some circumstances, for example where the aim is to fill out the detail by putting some flesh onto the bare bones of primary legislation. However, they are inappropriate in other circumstances, for example in cases like this which involve a substantial departure from the principles underlying the primary statute. This is because the government is not required to put forward any explanations for the measures it wishes to enact and because the measure itself is not subject to parliamentary scrutiny. Although the Secretary of State is under a duty to submit all proposals for making regulations to the Social Security Advisory Committee for comment, this general duty does not apply to regulations which are made within six months of primary legislation. As Ogus¹⁴ explains, the assumption is that such proposals will already have received adequate scrutiny by Parliament. However, in this case, the assumption clearly did not apply. The draft regulations were considered by the Council on Tribunals and, although the Council has not issued an official statement, it is clear that they were unhappy with the proposal. Thus, in evidence to the Social Security Select Committee on 23 June 1999, Ms Anne Galbraith, a Member of the Council on Tribunals, stated that '[T]he Council on Tribunal ... have, throughout, expressed our anxieties about single-member tribunals. Our preference would be for three-member tribunals. We felt that the lay members brought a very important contribution. We have heard some of the points about chairmen sitting alone, and these have been a constant theme. We have been very anxious about the balance and what proportion of cases would be heard by single-member tribunals'. This being so, it would appear that the government was undeterred by the Council's reservations. John Eames, Chair of the Social Security Committee of the Council, who also gave evidence, referred to the possibility that single-member tribunals would not be capable of such adjudicative quality or consistency as two or three member tribunals; the quality of deliberation which is significantly higher where there is some form of dialogue (as there is in a two or three member tribunal); and the balancing act which single member tribunals will have to perform as appellants and others speak, whilst somehow effectively keeping a watch on body language. He noted, further, that although judges in other courts sit

alone, for the most part, they are not required to keep a full written record of proceedings.

IMPLICATIONS FOR SOCIAL SECURITY

Procedural considerations of legality and procedure do not really touch on the merits of the proposal. The fact that, within a very short period of time, the government moved from a position in which, in the Social Security Bill 1997, it attempted to remove the lawyer's input into tribunal decision making to one in which, in the Social Security and Child Support (Decisions and Appeals) Regulations 1999, it has actually removed the lay members' input, ought to set alarm bells ringing. It certainly suggests that the DSS has had no clear idea of what it wants from appeal tribunals. However, outside the DSS, it is widely believed that, notwithstanding the increasingly tightly regulated legislative framework, the curtailment of discretion and the resulting marginalisation of lay members, lay members could still have made a significant contribution to tribunal proceedings because they are often more approachable than lawyers; bring wider experience to bear on the issues in dispute; adopt a more 'common sense' approach to decision making and are better at establishing the 'facts' where these are in dispute. They are often better at assessing the appellant's credibility, they provide a check on any prejudices or biases the legal chairman may have and an opportunity for the chairman to discuss the evidence pertaining to the case, the arguments put forward, the tribunal's decision and the reasons for it. And if the performance of lay members is, in practice, less impressive than this, a more serious commitment to selection, monitoring and training which aimed to identify and nurture the distinctive contribution to tribunal proceedings which lay members could have been encouraged to take, would, almost certainly, have enhanced the quality of tribunal decision making, conferred additional legitimacy on tribunals and thus made tribunal decisions more acceptable. Lay members were not paid but received travel expenses and, in a diminishing number of cases where they lost wages as a result of sitting on a tribunal, an allowance *in lieu*. With such a large pool of people willing to volunteer their services in this way, any assurance that lay participation could give to appellants was arguably well worth

preserving. Some cost would have been involved if training had been taken but this would have been relatively small and would almost certainly have represented good value for money.

WIDER IMPLICATIONS

One of the most notable distinctions between the British and other systems of administrative law has been the amount of lay participation in the tribunal process. In some countries, e.g. the United States, judges sitting alone hear most administrative disputes. Sometimes, they are actually employees of the agency under review, in which case, the procedure for remedying grievances will not involve independent adjudication but, rather, an extension of the administrative process. Moreover, there is no sense in which this form of grievance handling enables an appellant to feel that he is being judged by his peers.

In the United Kingdom, on the other hand, lay participation in the form of lay membership of administrative tribunals does give some assurance to an appellant or a defendant that he is being judged by his peers. Such a view has, of course, long been a part of our constitutional practice in the criminal courts, and the extension of this principle to administrative procedures is viewed favourably by commentators in other countries who regard their own systems as over-judicialised. The analysis of responses to the Green Paper referred to above revealed that the combination of a legally qualified chairman sitting with lay members was seen, not as a weakness, but as a positive feature of the tribunal system¹⁵. Several respondents observed that the then current membership of SSATs was the culmination of years of development and that it reflected the benefits of involving lay people from a wide range of personal and working backgrounds. Against this background, one might have expected that the onus of proof would have been on those who wished to alter the status quo. Sadly, this was not the case and it is a matter of considerable regret both that the contribution of lay members to tribunal decision making in social security should have been ended and that no arguments for doing so were ever publicly put forward. Notwithstanding the diversity among the many different types of administrative

tribunal, there is a real danger that the other government departments will seek to follow the lead taken by the DSS. The danger, if they do so, is that tribunals will become a less effective means of dispute resolution than the civil courts, a less effective check on poor quality administrative decision making, and a less effective means of delivering administrative justice.

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10. Wikeley, N. (1998) 'Decision Making and Appeals under the Social Security Act 1998', *Journal of Social Security Law*, 5 (3), at p. 113.
11. Department of Social Security (1996), *op. cit.*
12. *Ibid*, paras 5.3-5.6, 5.9, 6.14-6.15.
13. Sainsbury, R. (1997) *Improving Decision Making and Appeals in Social Security*, London: Department of Social Security, paras 7.3, 7.7.
14. Ogus, A. (1998) 'SSAC as an Independent Advisory Body: its role and influence in policy making', *Journal of Social Security Law*, 5 (4), at p. 156.
15. Sainsbury, *op. cit.*, para. 7.6.

CHAPTER 9

SUBSTANTIVE JUSTICE AND PROCEDURAL FAIRNESS IN SOCIAL SECURITY*

ABSTRACT

This paper examines the relationship between substantive justice and procedural fairness in social security. After considering whether this is a theoretical or an empirical issue and concluding that it is an empirical matter, it reviews developments in the UK social security system since 1979. It provides a critical assessment of the adequacy of benefit levels and of the proposals contained in the government's Green Paper *Improving Decision Making and Appeals* (DSS 1996) published last year. It then explores the implications of substantive justice and procedural fairness for different theories of citizenship and contrasts the different positions of social democratic and 'new right' thinkers on the status of social rights and their relationship to civil and political rights. It concludes with an examination of the relationship between poverty, justice and citizenship in the UK today.

The paper is in four parts. Part 1 analyses the concept of justice; Part 2 reviews the recent evidence relating to substantive justice in the UK social security system; Part 3 does likewise with procedural fairness; while Part 4 discusses the implications of recent developments for citizenship. Part 2 draws extensively on the CPAG publication *Poverty: the Facts* (Oppenheim and Harker 1996) and the Joseph Rowntree Foundation's *Inquiry into Income and Wealth* (Barclay 1995, Hills 1995), while Part 3 draws on material which appears in the Richard Titmuss Memorial

* This paper is dedicated to the memory of Matthew Walsh, whose PhD thesis on 'The Concept of "Quality" as a Possible Means of Evaluating the Social Security System' would have addressed many of the issues raised here, in particular the relationship between process and outcome, albeit in a rather different way. Tragically, Matthew died in a climbing accident on Mont Blanc in 1992, at the end of his first year in Edinburgh, by which time he had developed a novel theoretical framework and produced a detailed research proposal (Walsh 1992) but had not yet embarked on any empirical research. In writing this paper, I have been reminded of how much I learned from Matthew's imaginative

Lecture (Adler 1997a) which the author delivered in Jerusalem in November 1996 and in a subsequently published article (Adler 1997b).

PART 1: THE CONCEPT OF JUSTICE

According to the American social philosopher John Rawls (1972, p. 7), 'the subject matter of justice is the basic structure of society, or more exactly, the way in which the major social institutions' (which comprise 'the political constitution and the principal economic and social arrangements') 'distribute fundamental rights and duties and determine the distribution of advantages from social co-operation'. Justice is, for Rawls (*ibid.*, p. 3), the primary criterion by which the basic structure of society should be judged, 'the first virtue of social institutions, just as truth is of systems of thought'.

Rawls distinguishes (*ibid.*, p. 10) between the concept of justice, which refers to 'a proper balance between competing claims' and competing conceptions of justice, each of which expresses a different set of 'principles for identifying those considerations which determine the balance'. The coexistence of a single concept and several competing conceptions suggests that justice, like many other important social and political ideals, is essentially contested (Gallie 1964). As such, it can be defined in a relatively uncontroversial or uncontentious way (in this case as 'a proper balance between competing claims') but the terms in which it is defined (i.e. what constitutes 'a proper balance' and even what are to count as 'claims') are the subject of considerable disagreement.

Put another way, justice entails 'ensuring that everyone receives their due' (Miller 1976, p. 20) and a just state of affairs is one in which individuals receive exactly what is due to them in terms of their personal characteristics and circumstances. Although it is clear that there is considerable disagreement about what is due to an individual and how this should be determined, there is general agreement that justice

and iconoclastic approach and of how much he might have contributed to the problems I have sought to address.

is concerned with the ways in which items are distributed among persons or groups whose characteristics and circumstances are open to inspection. Thus it refers to the share of an item which individual members of a group receive rather than to the total amount of an item that is enjoyed by the group as a whole and, as such, it is a distributive rather than an aggregative principle.

Legal justice and social justice

It has become commonplace to distinguish between different subdivisions of justice in terms of their fields of application. Thus, Honoré (1970) points out that while restorative justice is concerned with compensation for harm or injury (in civil matters), punitive justice is concerned with the punishment of wrong-doing (in criminal matters). Together they comprise legal justice and are largely, but not exclusively, the concern of the legal system, i.e. of lawyers and the courts. Social justice, on the other hand, is concerned with the distribution of benefits and burdens among individuals and groups in society. As such, social justice refers to matters such as the distribution of income, wealth and other 'primary goods' such as health, education, social security etc. However, two caveats need to be made here:

- because punishments have been included in the domain of legal justice, the burdens included here refer to disadvantages other than punishments, e.g. to taxes or unpleasant work;
- although social justice usually refers to the allocation of material benefits and burdens, it can also refer to intangible (non-material) resources, e.g. praise and blame.

Although social justice has been distinguished from legal justice, some of the same moral considerations apply to them both. Likewise, although legal justice is obviously bound up with the law as an institution, so too is social justice - they are merely concerned with different aspects or areas of law.

Substantive justice and procedural fairness

While *substantive justice* is concerned with outcomes, *procedural justice* (which we shall refer to as *procedural fairness*) is concerned with process. Substantive justice is perhaps more straightforward and will be considered first.

There are at least two dimensions to substantive justice. Thus, in his seminal analysis of the choices confronting policy makers in social security, Richard Titmuss (1970) distinguishes *adequacy* (defined in terms of sufficiency and referring to the absolute amount received) from *equity* (defined in terms of fairness and referring to the relative treatment of one person or group in relation to others). His insight that concepts of adequacy are increasingly entangled with concepts of equity is not only important but is clearly also of wide and general application to fields far removed from social security.

One view of procedural fairness, which Rawls amongst others subscribes to, ties it to substantive justice by equating it with those procedures which lead to just outcomes. Galligan (1986, p. 138) likewise argues that 'the object of procedures is to realise a given object, and so in this sense procedures are instrumental to outcomes'. However, another view suggests that substantive outcomes are not necessarily enhanced by increasing procedural safeguards. Indeed, Prosser (1981) has even suggested that enhanced procedural fairness may provide a degree of legitimacy to unjust substantive outcomes, thereby deflecting criticism and making them impervious to change.

There have been various attempts to specify the requirements of procedural justice. Thus, in legal justice, we refer to a fair trial (in the case of criminal prosecutions) and to fair proceedings (in civil matters). In a criminal prosecution, the procedural requirements reflect the rights and duties of the accused and the state. However, there is wide agreement that accused persons should be entitled to know the case against them and to be legally represented, to plead not guilty and, if they do so, to be deemed innocent until proven guilty. The evidence against them must stand up

and the case for the prosecution must be established 'beyond reasonable doubt'. Similarly, in a civil action, there are procedural requirements which reflect the rights and duties of the parties in dispute.

Procedural considerations are also an important component of social justice. Thus, for example, it is widely held that like cases should be dealt with alike, policies should not be applied retrospectively, people should be shown respect, their circumstances should be investigated thoroughly, their claims should be decided impartially and expeditiously irrespective of the outcome, and there have been a number of attempts to specify what procedural fairness involves. Thus, Mashaw (1983, p. 24) defines *administrative justice* (the procedural justice inherent in administrative decision-making) in terms of

'those qualities of a decision process that provide arguments for the acceptability of its decisions'.

i.e. the principles which can be invoked in seeking legitimation for the justice of the decision-making process.

In his study of the American Disability Insurance (DI) scheme, Mashaw detected three broad strands of criticism leveled against it: producing inconsistent decisions, failing to provide a good service, and failing to ensure 'due process' and respect claimants' rights. He argued that each strand of criticism is based on a different normative conception of the DI scheme, i.e. a different model of what the scheme could and should be like. These three models are *bureaucracy* (Mashaw refers to this as 'bureaucratic rationality'), *the professions* (Mashaw calls it 'professional treatment') and the *legal system* (Mashaw's term is 'moral judgment').

Each model is associated with a different set of principles. Based on Mashaw's approach, we can associate a different mode of decision-making, a different legitimating goal, a different mechanism of accountability and a different type of

remedy with each of the three models. The characteristics of each of these models are set out in Table 1 below:

Table 1: The characteristics of different models of administrative justice

Model	Mode of decision making	Legitimizing goal	Nature of accountability	Characteristic remedy
bureaucracy	applying rules	accuracy	hierarchical	administrative review
profession	applying knowledge	service	interpersonal	complaint to a professional body
legal system	weighing up arguments	fairness	independent	appeal to a court or tribunal

According to Mashaw, each of the models is also associated with a different conception of administrative justice. This is because, in each case, different principles are invoked to assess the acceptability of decisions. Thus one conception of administrative justice is based on the model of an organisation as a bureaucracy, another is based on the model of the organisation as a profession, and a third is based on the model of the organisation as a legal system. Mashaw argues that each of the three models is ‘coherent and attractive’ and that, in his terminology, they are *highly competitive* rather than *mutually exclusive* (*ibid.*, p. 23). Thus, these models can and do co-exist with each other. However, other things being equal, the greater the influence of one, the less will be the influence of the others. It follows that overall administrative justice, i.e. the justice inherent in day-to-day decision-making, can be understood as a ‘trade-off between the different conceptions of administrative justice associated with each of the three models, i.e. with bureaucracy, professionalism and the legal system.

The trade-offs which are made, and likewise those that could be made, reflect the concerns and the bargaining strengths of the institutional actors who have an interest in promoting each of the models, typically civil servants and officials in case of the bureaucratic model; doctors, social workers, police officers, other professionals and ‘street level bureaucrats’ (Lipsky 1980, p. 1991) in the case of the professional model;

and lawyers, court and tribunal personnel and groups representing clients' interests in the case of the legal model. Thus, these trade-offs vary from one organisation to another and, within a given organisation, from one area of activity to another.

Developing a constructive critique of Mashaw's approach, Sainsbury (1992) puts forward a much less relativistic conception of administrative justice, suggesting, first, that it comprises accuracy and fairness, and, second, that fairness consists of promptness, impartiality, participation and accountability. Galligan (1996, p. 95) is, like Mashaw, rather more relativistic and equates procedural fairness with those 'procedures which lead to fair treatment according to authoritative standards'.

Although Mashaw's approach is very attractive, it can be criticised on a number of grounds. It is extremely prescriptive since it holds that the three models of administrative justice referred to above, and only these three models, always need to be taken into account. This is not necessarily correct and, for example, a strong argument can be made that the new emphasis on managerialism in public administration represents an additional model which is in competition with the other three (Adler 1997a and b). It is also very relativistic in that it implies that the administrative justice of an organisation necessarily depends on what kind of organisation it is.

A more fundamental criticism of Mashaw's approach is that it assumes a high degree of consensus on the values underlying programmes like the DI scheme and a correspondingly high level of agreement on the goals which such programmes should aim to achieve (Maranville 1984). Consensus on values and agreement on goals may exist but, on the other hand, it may not. However, as Adler and Longhurst (1994) have demonstrated in their analysis of decisions relating to the management of long-term prisoners, Mashaw's approach can also be applied to competing models of what programmes are for as well as to competing models of how programmes should be run, i.e. to competing models of substantive justice as well as to competing models of procedural fairness. Each of the models of substantive justice may, in theory, be

combined with each of the models of procedural fairness and each of the paired combinations can be associated with a different group of institutional actors.

The resulting two-dimensional model of justice is necessarily more complex but its characteristics are still the same in that it not only enables us to see what trade-offs are made between different combinations of substantive and procedural justice in particular cases, but also to consider what different sets of trade-offs might be more desirable. What would be desirable is, of course, not necessarily feasible.

The relationship between substantive justice and procedural fairness

At this point, it is appropriate to ask whether there is a relationship between substantive justice and procedural fairness. But, before doing so, it is important to determine what kind of question this is and to decide whether it is a theoretical or an empirical question. If there were a causal relationship between substantive justice and procedural fairness, i.e. between procedures and outcomes, it would follow that the question is a theoretical one but if, on the other hand, the relationship between them were purely contingent, it would follow that it is an empirical one.

By considering social security, it should be clear that there is no causal relationship between substantive justice and procedural fairness. This is because fair procedures do not necessarily lead to just outcomes - scrupulously fair procedures can result in manifestly unjust outcomes while outcomes which are, at least in the aggregate, accepted as just may be arrived at rather arbitrarily. Similarly, low levels of entitlement can be given a high degree of procedural protection whereas high levels of entitlement can receive very little protection at all. It follows, therefore, that the relationship between procedural justice and substantive justice in social security is an empirical one which can only be investigated by reviewing the empirical evidence.

PART 2: SUBSTANTIVE JUSTICE IN THE UK SOCIAL SECURITY SYSTEM

The goals of social security

Three of the main goals of social security are *the provision of income support, the reduction of inequality* and *the promotion of social integration*. The provision of income support refers to poverty relief, the protection of customary living standards and the smoothing out of income over the life-cycle; the reduction of inequality implies redistribution from individuals and families on higher incomes to those on lower incomes through vertical transfers and from individuals and families with lesser needs to those with greater needs through horizontal transfers; while social integration implies that benefits should not be stigmatising or socially divisive but, on the contrary, should foster social solidarity (Barr and Coulter 1990).

Substantive justice refers to the extent to which these aims have been realised in practice and policy can be evaluated in terms of its success in achieving these goals. Providing a comprehensive assessment of social security policy in terms of all of these goals and each of the measures they refer to is clearly beyond the scope of this paper and I shall therefore focus on two of the most important measures: poverty relief and the extent of redistribution from rich to poor. This will be done by looking first at social security policy in the period up to 1979 under a succession of Conservative and Labour governments and then at social security policy in the period since 1979 when the Conservatives were returned to office under Margaret Thatcher.

The aims of social security policy

During the 1960s and 1970s, the main aim of social security policy was to move away from means testing by raising the level of national insurance and other categorical benefits above that of supplementary benefit, the national scheme of social assistance. Thus, during the 1970s, real spending on national insurance and other non means-tested benefits rose by about 25 per cent. Other important aims

were to protect benefits against inflation, to make more benefits earnings-related and to increase public expenditure on social security.

The main aims of social security during the 1980s and 1990s could hardly have been more different. The primary aims of social security policy were to increase incentives in order to encourage people to remain in or to rejoin the labour market; to introduce greater targeting by increasing the reliance on means testing; and to reduce public expenditure on social security. However, because of the large rise in unemployment, expenditure on social security rose rather than fell. Within the larger total, the proportion of expenditure which went on means-tested benefits increased quite substantially.

Poverty relief

The definition and measurement of poverty are both very controversial. A key issue is whether poverty should be regarded as 'absolute' or 'relative', i.e. whether it should be defined in relation to a fixed subsistence level uprated only in line with price inflation or in terms of the living standards of society as a whole, being uprated broadly in line with earnings or income. Poverty can be defined in terms of an insufficiency of income (and/or other disposable resources) but the existence of these two apparently irreconcilable conceptions of insufficiency suggests that, like justice, poverty is also an *essentially contested concept* (Gallie *op. cit.*). However, this conclusion has been contested by Sen (1983) who argues that poverty has absolute as well as relative features. His approach involves distinguishing those *capabilities* or basic needs, whose satisfaction is a condition of effective social functioning, from the bundle of *commodities*, and the income required to obtain them, which make effective social functioning possible in practice. Sen argues that, whereas basic capabilities (which include the need to meet nutritional requirements, to escape avoidable diseases, to be sheltered, to be clothed, to be able to travel, to be educated, to live without shame, to participate in the activities of the community and to have self respect) can be defined absolutely, their commodity requirements are clearly variable and can only be defined relative to the society in question.

Accepting Sen's conclusion that the commodities that are required for effective social functioning will vary across time and space still leaves us with the problem of deciding what, in a given society at a given time, these commodities are and what level of income is required to purchase them. This would ideally require ongoing empirical research focused on this issue but, needless to say, it does not exist in the United Kingdom and it is therefore necessary to make the best out of the survey data that are available.

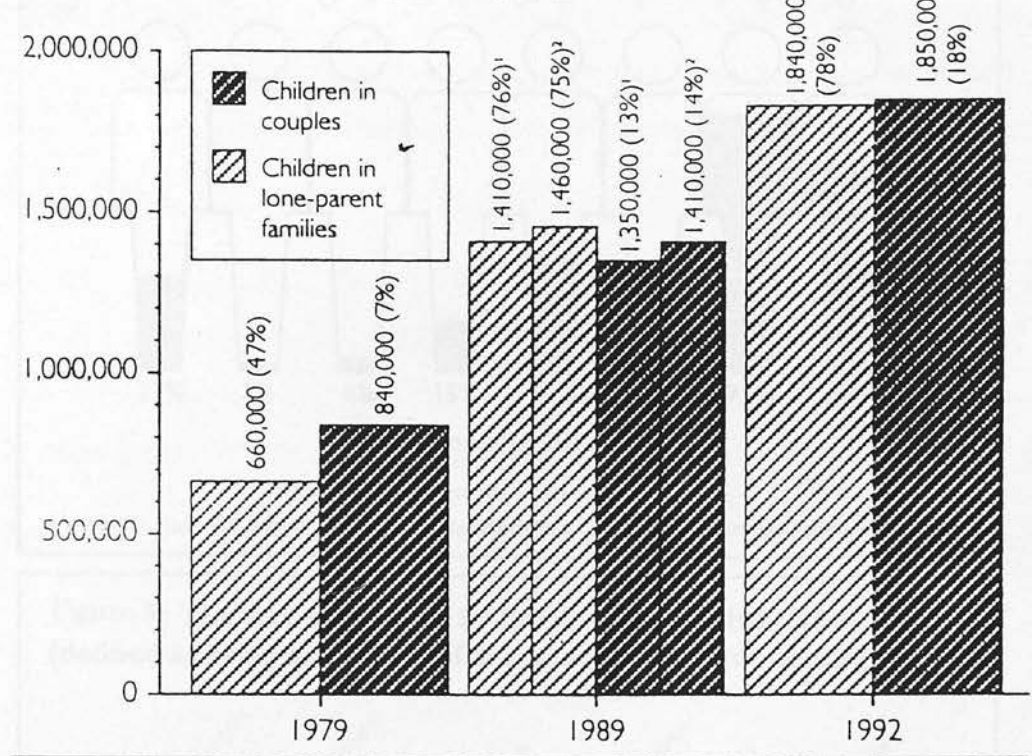
Measures of poverty

Unlike some other countries, there is no official poverty line in the United Kingdom, i.e. no government-sanctioned marker that admits the existence of poverty. However, two sets of official statistics are routinely used to provide proxy measures. The first of these is based on the *Low Income Families (LIF) Statistics* which were published by the Department of Social Security (DSS) from 1972 until a decision was taken to cease publication in 1985. Subsequently, they were produced by the independent Institute of Fiscal Studies and are now published under the auspices of the House of Commons Social Security Committee. This statistical series gives the number of people living on, below or just above supplementary benefit/income support, i.e. social assistance, levels. The second poverty line is based on the *Household below Average Income (HBAI) Statistics* with which the government replaced LIF. The measure of poverty which is most commonly used gives the number of people living at or below 50 per cent of average income net of housing costs and adjusted for family size.

Both sets of statistics are derived from the same source, i.e. from the *Family Expenditure Survey (FES)*, an annual government survey of a representative sample of around 7,000 households in the UK. Neither set of statistics is perfect and each has its strengths and weaknesses (Oppenheim and Harker 1996, Appendix 1). The first approach allows us to assess how many people are living on or below what the state deems to constitute a minimum level of income for people who are not in 'full-time' work and is an important way of assessing the extent to which, on the

government's own terms, social security provides an effective means of poverty relief. The second approach is an explicitly relative measure and looks at how people at the bottom end of the income distribution have fared in relation to the average. In spite of the differences between them, the two measures give quite similar results.

Figure 1 : Numbers and proportion of children living in poverty, on or below supplementary benefit/income support in 1979, 1989 and 1992 by family type



Notes: The percentages show the proportion of children in each family type living in poverty – eg. in 1979, 47% of children in lone-parent families were living in poverty. Two sets of figures are given for 1989 because of methodological changes in the way the figures were calculated. 1989¹ relates to the method used for the 1979 figure also. 1989² relates to the method used for the 1992 figure also. Comparisons between 1979 and 1992 should be drawn with caution.

Source: DSS, *Households below Average Income, a statistical analysis, 1979-1992/93*, and revised edition, HMSO, 1995.

The extent of poverty

The LIF Statistics show that 13.7m people (24 per cent of the UK population) were living at or below Income Support levels in 1992. Of these, 4.7m people (8 per cent

of the population) were actually living below the 'official' poverty line. In addition, 18.5m people (33 per cent of the population) were living in or on the margins of policy with incomes of up to 140 per cent of Income Support levels.

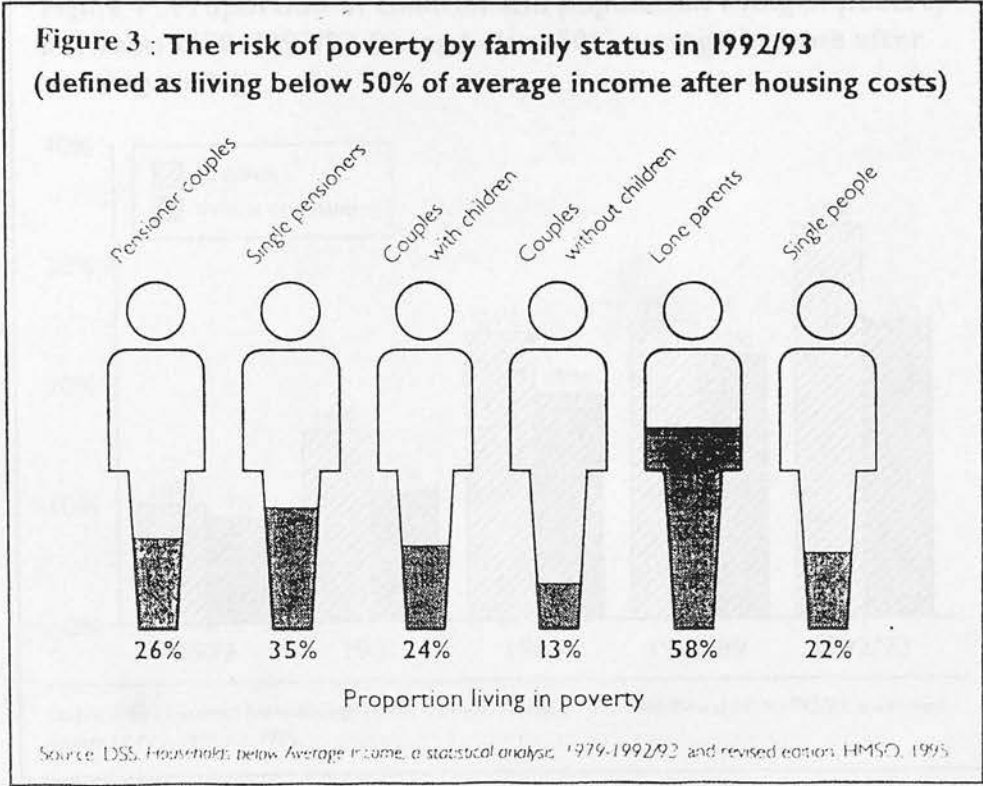
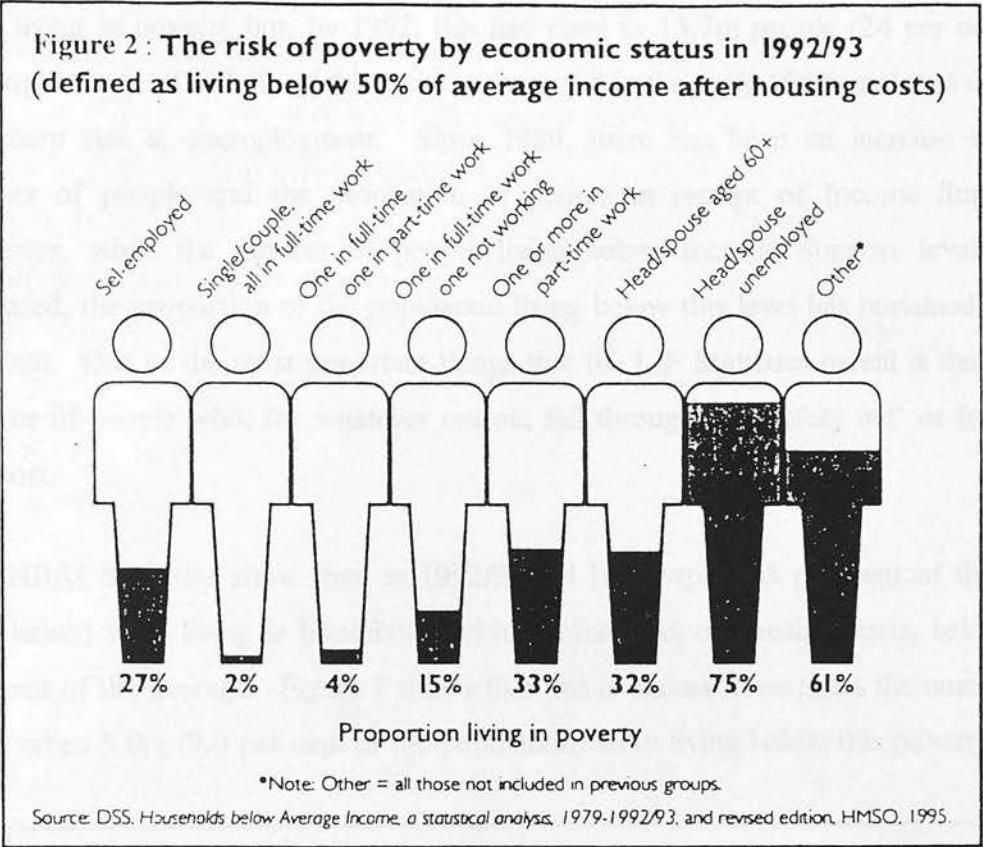
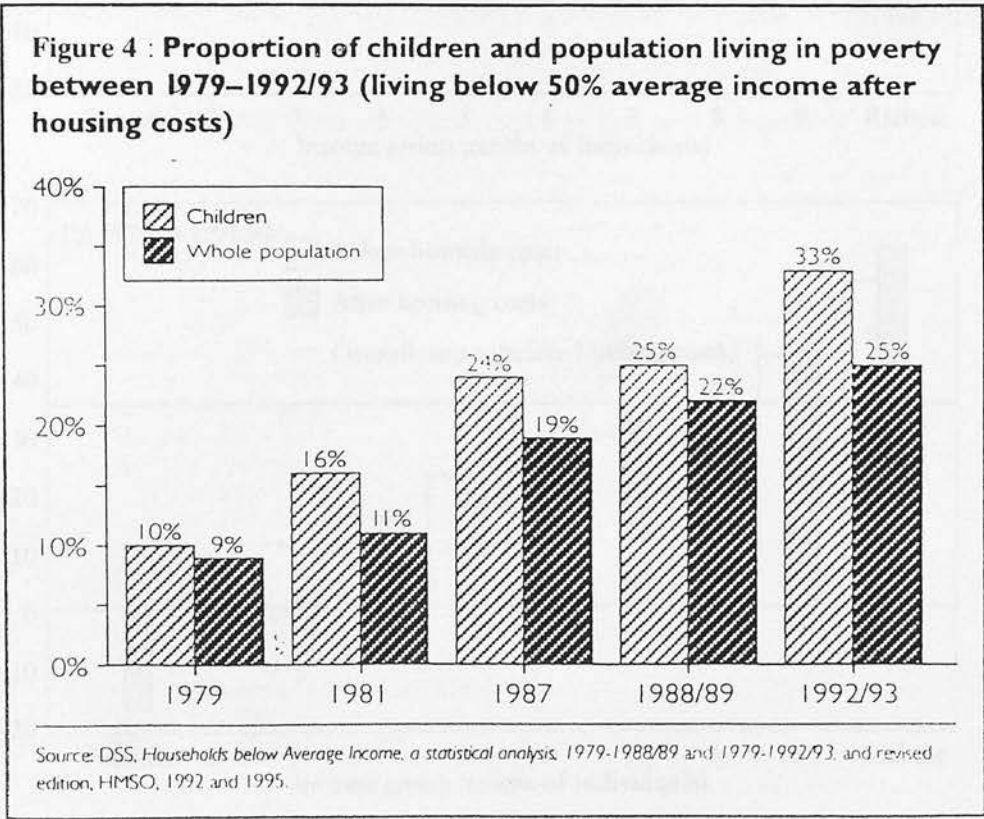


Figure 1 shows the increase in the number of people living at below or just above Income Support levels between 1979 and 1992. Due to recent changes in the way in which figures are calculated, two sets of figures are given for 1989 (reflecting the old and the new methods). In 1979, 7.7m people (14 per cent of the UK population) were living in poverty but, by 1992, this had risen to 13.7m people (24 per cent of the population). The bulk of this increase occurred in the early 1980s and was due to the sharp rise in unemployment. Since 1989, there has been an increase in the number of people and the proportion of people in receipt of Income Support. However, while the number of people living below Income Support levels has increased, the proportion of the population living below this level has remained fairly constant. One of the most important things that the LIF Statistics reveal is the large number of people who, for whatever reason, fall through the ‘safety net’ of Income Support.

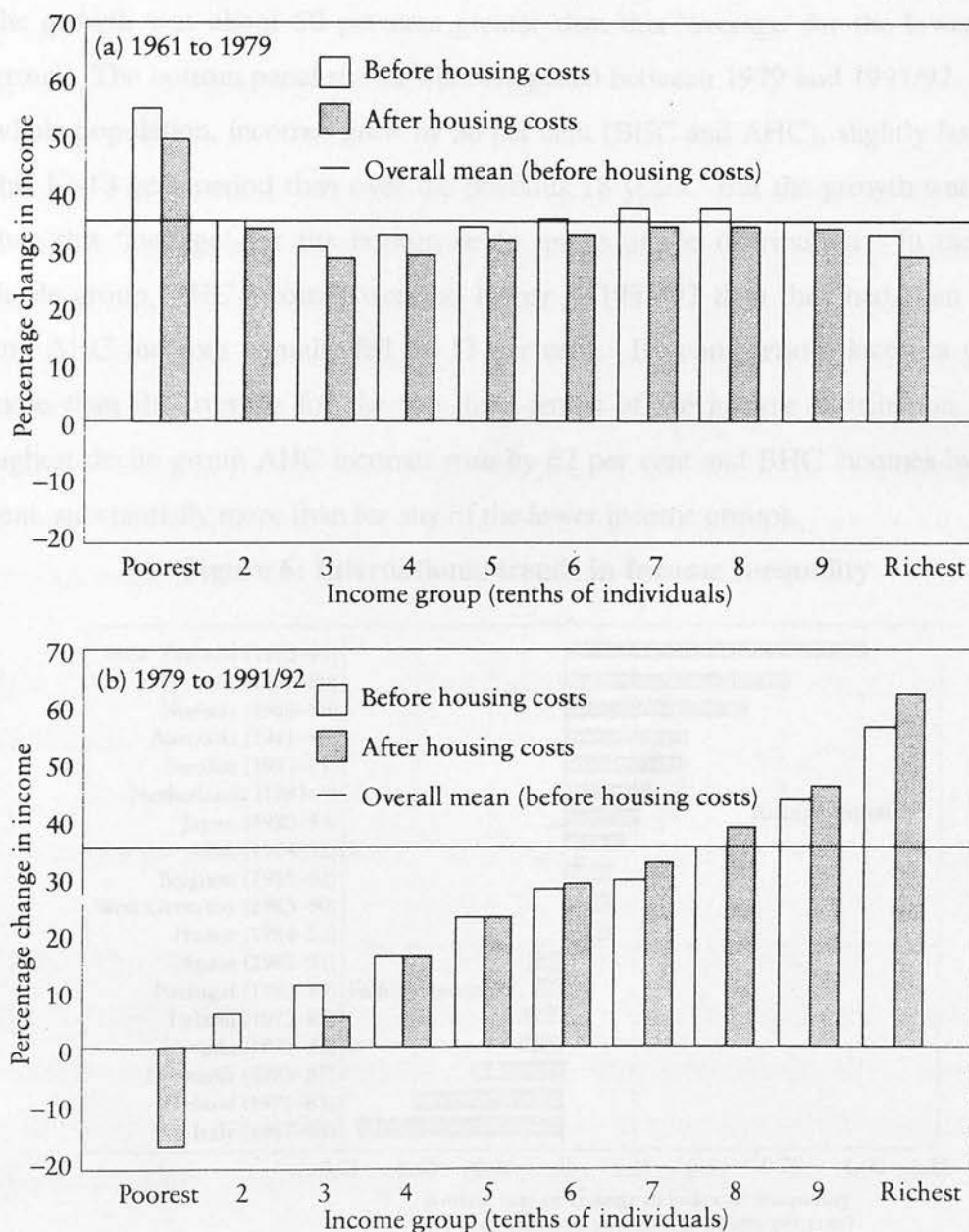
The HBAI Statistics show that, in 1992/93, 14.1m people (25 per cent of the UK population) were living in households with incomes, net of housing costs, below 50 per cent of the average. Figure 2 shows that this is almost three times the number in 1979 when 5.0m (9.0 per cent of the population) were living below this poverty line.



Figures 3 and 4 show how poverty is related to economic and family status. The groups with the highest risk of experiencing poverty are the unemployed (75 per cent of whom were in poverty) and lone parent households (58 per cent of whom were in poverty in 1992/93). Figure 2 also shows that children were more vulnerable to poverty than society as a whole throughout the period from 1979 to 1992/93. Thus in 1979, 10 per cent of all children and 9 per cent of the population were in poverty while, in 1992/93, the corresponding figures were 33 per cent of all children compared to 25 per cent of the population.

Redistribution from rich to poor

Figure 5: Change in Real Net Income, 1961-1979 and 1979-1991/2

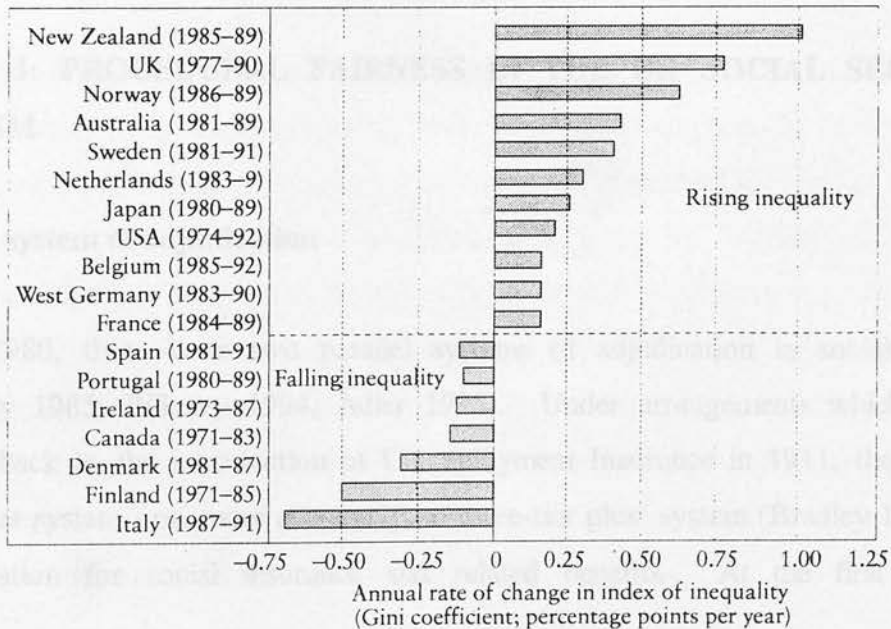


Source: reproduced from Barclay (1995), Figure 3 and Hills (1995), Figure 16.

The HBAI statistics only provide comparative data as far back as 1979, and cannot be used to make comparisons over a longer period. However, the Joseph Rowntree Foundation's recent *Inquiry into Income and Wealth* (Barclay 1995, Hills 1995) analysed changes in the distribution of income over a longer period.

Figure 5 summarises the changes in inequality that have taken place in the UK during the last four decades. The top panel shows the growth in real net income between 1961 and 1979 for the population as a whole and for successive deciles of the population. It does this for income before deducting housing costs (BHC) and after deducting them (AHC). For the whole population, incomes grew by 35 per cent (BHC) and 33 per cent (AHC). But, at 55 per cent (BHC) and 51 per cent (AHC), the growth was about 50 per cent greater than this 'average' for the lowest decile group. The bottom panel shows what happened between 1979 and 1991/92. For the whole population, incomes grew by 36 per cent (BHC and AHC), slightly faster over this 12-13 year period than over the previous 18 years. But the growth was smaller than this 'average' for the bottom seven tenths of the distribution. In the lowest decile group, BHC incomes were no higher in 1991/92 than they had been in 1979 and AHC incomes actually fell by 17 per cent. By comparison, incomes grew by more than the average for the top three-tenths of the income distribution. In the highest decile group AHC incomes rose by 62 per cent and BHC incomes by 57 per cent, substantially more than for any of the lower income groups.

Figure 6: International trends in Income Inequality



Source: reproduced from Barclay (1995), Figure 2.

Figure 6 shows the annual rate of change in inequality over the most recent period for which a generally consistent trend can be identified in the UK and seventeen other countries. While the data do not make exact comparisons possible, their implications are clear. There has not been a universal trend towards greater inequality in recent years, although this has been the case in the majority of other countries shown. However, the speed with which inequality increased in the UK between 1977 and 1990 (with the index of inequality increasing at 0.75 percentage points each year) was faster than in any of the other countries listed with the single exception of New Zealand over the four years to 1989. In most of the other countries where inequality was increasing, it was at less than half the British rate.

Summary - changes in substantive justice

Not only has the extent of poverty risen over the last two decades but the degree of income inequality has also increased. 70 per cent of the two poorest decile groups comprise households with no earnings and 70 per cent of the gross income of these two groups comes from social security benefits. Since 1979, the substantive entitlements provided by social security have not kept up with the higher living standards enjoyed by the rest of the population and social security has provided increasingly less adequate protection to those who are unable to support themselves through employment.

PART 3: PROCEDURAL FAIRNESS IN THE UK SOCIAL SECURITY SYSTEM

A dual system of adjudication

Until 1980, there were two parallel systems of adjudication in social security (Bradley 1985; Wikeley 1994, Adler 1995). Under arrangements which can be traced back to the introduction of Unemployment Insurance in 1911, there was a three-tier system - or, more accurately, a 'three-tier plus' system (Bradley 1985) - of adjudication for social insurance and related benefits. At the first tier, all

non-medical, i.e. lay, questions were dealt with by National Insurance Officers (the forerunners of the present Adjudication Officers) while medical questions (most of which arose in relation to sickness/invalidity and disability benefits) were dealt with by general medical practitioners. Appeals against first-tier decisions were heard by National Insurance Local Tribunals (NILTs) and Medical Appeal Tribunals (MATs) - the former dealt with lay questions and the latter with medical questions. There was then a further appeal from NILTs and MATs on a point of law to the National Insurance Commissioners.

Although National Insurance Officers (NIOs) were civil servants, as far as adjudication was concerned they were expected to act independently in applying the law (statute law and case law) to the facts of the case. Thus, they were not answerable to management or to the Minister in Parliament for their decisions. NILTs comprised a legally qualified chairman and two lay members (one representing employers and the other trade unions) while the Commissioners were all experienced lawyers of at least 10 years standing. Their decisions constituted a set of precedents which had to be followed by NILTs and NIOs. Thus, they were, in effect, specialised administrative law judges. Finally, since all tribunals are supervised by the courts, there was the possibility of a further appeal, on a point of law, from the Commissioners to the Court of Appeal (in England and Wales) or to the Court of Session (in Scotland) and ultimately to the House of Lords.

A wholly different model of adjudication applied to social assistance benefits. Under arrangements which can be traced back to the introduction of Unemployment Assistance in 1934, there was a simpler (and more attenuated) two-tier system of adjudication. At the first tier, decisions were taken by Supplementary Benefit Officers (SBOs). There was then a right of appeal to a Supplementary Benefit Appeal Tribunal (SBAT) whose decisions were final. SBOs were also civil servants and were expected to apply statute law and Commission policy (there was very little case law) to the facts of the case. SBATs also comprised three members but they had a lay chairman and could override Commission policy by substituting their own discretion for that of the SBO.

The contrast between the two systems was striking. In the case of Supplementary Benefits, the law gave considerable discretion to the Supplementary Benefits Commission. Although Commission policy was expressed in endless rules and regulations, officials nevertheless had a fair amount of discretion in implementing policy. There were no precedents to be followed and SBATs functioned rather like case conferences. In national insurance, officials had much less discretion in applying the law, tribunals were more like courts and Commissioners' decisions constituted a body of case law.

Rights (associated with a legal model of decision making) were much stronger in national insurance while discretion (associated, perhaps somewhat incongruously, with a professional model of decision making) was much greater in Supplementary Benefit. However, rules and regulations (associated with a bureaucratic model of decision making) were even more important in both cases. The fact that first-instance decision makers were all generalist civil servants (and, as such, were neither trained as lawyers nor as welfare professionals) and the limited availability of specialist advice and representation which are needed to enable claimants to challenge bureaucratic procedures guaranteed their pre-eminent position (Adler 1997a and b).

The emergence of a single system

As far as Supplementary Benefit was concerned, the 1980 legislation changed the position completely. The model of adjudication in Supplementary Benefit was subjected to sustained attack by the welfare rights movement for failing to protect claimants' entitlement to benefit, while the Supplementary Benefits Commission, and subsequently the government, concluded that the model was no longer viable. This was partly due to changes in the size and composition of the claimant population and to pressure from welfare rights activists but also reflected a lack of trust by claimants in officials who were being asked to exercise discretionary powers more suited to professionals. This model of adjudication was eventually abandoned in favour of the national insurance model which, for some years, applied to all social

security benefits administered by central government. The status of the first-tier decision makers in Supplementary Benefit cases became the same as that of first-tier decision makers in National Insurance cases, the composition and powers of SBATs became the same as those of NILTs and, in 1983, the two tribunals were merged into Social Security Appeal Tribunals (SSATs).

In 1984, all Adjudication Officers (AOs) were made accountable to the Chief Adjudication Officer whose roles include advising AOs on the performance of their functions, discharging certain responsibilities relating to appeals to the Commissioners, and monitoring standards of adjudication (Sainsbury 1989). In the same year, responsibility for appeal tribunals was transferred from the Department of Social Security to an independent statutory body (now known as the Independent Tribunal Service) under a President (appointed by the Lord Chancellor after consultation with the Lord Advocate), who is responsible for the appointment and training of all tribunal personnel, and all tribunal chairmen were required to be lawyers of five years standing. Commissioners' decisions in Supplementary Benefit cases constituted a body of case law with the force of precedent in exactly the same way as in other social security benefits (Baldwin, Wikeley and Young 1992; Adler 1995).

The extent of discretion available to AOs and SSATs (whose responsibilities now embraced all social security benefits) in Supplementary Benefit cases had clearly declined while that of rights had been brought into line with that in National Insurance and related benefits.

The re-emergence of two systems

In 1986, the pattern of adjudication changed again. Supplementary Benefit was replaced by a simplified Income Support scheme and a cash-limited, discretionary Social Fund. In addition to providing grants and loans as 'one-off' extras on a discretionary basis, the Social Fund is also responsible for a number of non-discretionary social security benefits, e.g. maternity and funeral payments. However,

since decisions about entitlement to these benefits are made by AOs and there is a right of appeal to a SSAT, there is no need to say more about that here. In the case of Income Support, the pattern of adjudication which had formerly applied to all social security benefits administered by central government continued to apply. In addition, a new requirement that appeals to a tribunal had to be preceded, as a first stage, by internal administrative review, was introduced for a number of new benefits (Sainsbury 1994). The effect of this was to reduce the number of decisions which were reversed on appeal.

The case of the Social Fund is altogether different (Drabble and Lynes 1989). First-tier decisions are made by Social Fund Officers acting under the direction and guidance of the Minister. There is no right of appeal as such (if there had been, tribunals could have made decisions which would have breached the cash-limits), although dissatisfied claimants can obtain a review of the decision in question (Dalley and Berthoud 1992). This is carried out first by the official who made the original decision and subsequently, after an interview with the claimant, by a senior member of the local office. Claimants who are still dissatisfied may request a further review by a Social Fund Inspector whose decisions are monitored by the Social Fund Commissioner. Although the arrangements are rather complex, the important point is that there is no appeal from an initial decision to an independent appeal tribunal, or from there to a body like the Social Security Commissioners, no body of case law and no mechanism that is in any way analogous to the Chief Adjudication Officer. Thus the resulting balance between rules, discretion and rights is similar to that which applied in supplementary benefits before the 1980 reforms. The trade offs between bureaucratic rules, administrative discretion and procedural (welfare) rights in each of the periods referred to are set out in Table 2.

Table 2: Trade offs between bureaucratic rules, administrative discretion and procedural rights in social security legislation over the last 25 years.

	Bureaucratic rules	Administrative discretion	Procedural rights
1971-1980			
Nat Ins	very strong	very weak	strong
Sup Ben	very strong	quite strong	weak
1980-1986			
Nat Ins	very strong	very weak	strong
Sup Ben	very strong	weak	strong
1986-present			
Soc. Sec (inc. I S)	very strong	very weak	quite strong
Social Fund	very strong	quite strong	weak

The latest proposals

I want now to summarise the latest proposals for ‘mproving’ decision making and appeals in social security, some of which have already been implemented, and then to subject them to critical scrutiny. These were first put forward by the (previous) Conservative Government in a Consultation Paper last year (DSS 1996) and most of them appear again in the 1988 Social Security Bill introduced by the (present) Labour Government. Although few of the proposals put forward in the Consultation Paper received much support (Sainsbury 1997), the new government seems determined to press ahead with them.

The aims of the ‘new’ approach which are set out in the Consultation Paper are inoffensive enough. They were

‘[t]o improve the processes for decisions and appeals; to produce a less complex, more accurate and cost-effective system for making and changing decisions; and to preserve customers’ rights to an independent review of decisions in appropriate cases.’ (*ibid.*, para. 1.2)

It is the detailed proposals which are so worrying. In regard to first-tier decision making, the Consultation Paper favoured the use of simpler and better-designed

claim forms; clearer rules and guidance about the evidence needed to support claims to benefit; an increased emphasis on direct contact with claimants, better explanations for decisions and improved computer support (*ibid.*, para. 1.3). However, in light of the likely cuts in expenditure on the administration on benefits (which is referred to below), it is hard to see how some of these worthwhile reforms, in particular more direct contacts with claimants (now known as ‘customers’), will be paid for.

The Consultation Paper also recommended that claimants who do not provide the evidence which can reasonably be sought from them should be penalised, e.g. by postponing the start of the entitlement until they produce it (*ibid.*, para. 4.8). Such a measure is bound to hit the most vulnerable claimants, e.g. those with learning difficulties or mental health problems, those who are socially disadvantaged or have a poor command of English.

In place of the dual system of accountability, the Consultation Paper proposed that first-tier decision makers, who are managerially accountable to the Minister and accountable to the Chief Adjudication Officer in respect of adjudication, should be accountable to the Minister alone (*ibid.*, para. 4.9). Their status would not be prescribed in law and the system of dual accountability, which appears to have worked well since it was established in 1911, would be ended. Moreover, in transferring the functions of the Chief Adjudication Officer to the Chief Executive of the Benefits Agency, which is now responsible for the delivery of social security benefits (*ibid.*, para. 4.14), all the advantages of an independent check on standards of adjudication would be lost.

Finally, the Consultation Paper proposed a series of reforms to the appeals process. Only cases which need to proceed to appeal would do so; the appeal would cover only the issue in dispute rather than the whole decision, and would refer to the date on which the decision appealed against was made rather than the date of the appeal hearing as at present (*ibid.*, para. 5.4). Cases would be sifted to decide how they should be handled; the range of expertise available to and the composition of

tribunals would not be prescribed; legal expertise would be reserved for 'appropriate' appeals with others being heard by non-legal decision makers; single decision makers would hear most cases with two or more decision makers 'only as necessary' (*ibid.*, para. 5.5). Finally, and this is one of the provisions which has already been put into effect, there would be a specific statutory provision for *paper hearings*, i.e. hearings dealt with on the papers alone, where appellants did not opt for an oral hearing (*ibid.*, para. 5.6).

The Consultation Paper ended by inviting comments on an appropriate model for decision making and appeals in social security for the future. The proposals, if put into effect, would radically alter the existing settlement, i.e. the delicate balance between bureaucratic, professional and legal considerations and between the interests of management, staff and claimants. Waiting in the wings was the alternative model of internal (administrative) review found in the Social Fund where there is no appeal to an independent appeal tribunal. This was commended for achieving 'independence' and 'public accountability' (*ibid.*, para. 6.14), and it is no secret that this was the former Secretary of State (Peter Lilley)'s preferred option for the entire social security system.

The case for reform set out in the body of the Consultation Paper is not particularly compelling in that the arrangements which it seeks to change have existed for many years and have neither been regarded as problematic nor in need for reform. The real case is to be found in Appendix G which reproduces the speech in which the Peter Lilley announced the Department's '*Change Programme*'. Although administrative costs only account for some 4-5 per cent of the total social security budget, the sums involved (£3-4bn. per year) are very substantial and, in an attempt to rein them in, he announced measures designed to achieve administrative savings of 25 per cent over three years. It is said that these savings were demanded by the Treasury (the UK Ministry of Finance) and that even Peter Lilley, who is known to be especially enthusiastic about public expenditure cuts, regarded them as excessive. Standards of adjudication, which currently leave a great deal to be desired (the Consultation Paper acknowledged that 22 per cent of Income Support decisions were inaccurate in

1994/95), are bound to deteriorate further as the result of these 'efficiency savings'. However, instead of recognising that this constitutes a strong argument for strengthening appeal procedures, the Government decided that the Independent Tribunal Service, which in spite of its independence from the Department of Social Security is financed by it, should bear its share of the cuts.

Submissions were received from 437 individuals and organisations and subjected to a detailed analysis (Sainsbury 1997). Although there was general support for the Government's stated aims, there was considerable opposition to most of the detailed proposals. However, instead of producing a White Paper, which responded to and took account of these criticisms and would have been particularly appropriate in light of the change of government, the Labour Government has introduced a Bill which adopts nearly all the proposals put forward by the Conservatives and ignores the results of extensive public consultation. Thus, Part 1 of the Bill abolishes the status of independent adjudication officers and makes officials accountable to the Secretary of State for all their decisions; does away with the Central Adjudication Service and makes Agency Chief Executives responsible for issuing guidance, monitoring the quality of decisions, and reporting on standards; allows for all appeals to be sifted to identify the nature and type of expertise needed to deal with them; removes the requirement that all cases must be heard by a three-person tribunal and the requirement that tribunal chairs must be legally qualified. Why it has chosen to do so is both unclear and beyond the scope of this article. That it has chosen to do so is clear and beyond dispute.

The trade offs entailed by the Government's proposals are set out in Table 3.

Summary - changes in procedural fairness

Prior to the 1992 reforms, applicants for and recipients of social assistance were largely dependent on the discretion of officials and received little protection from appeal tribunals. However, as a result of these and other reforms, 3.4 million people were brought into line with other social security benefits and the right of independent and professional appeal established through the establishment of the Office of

Table 3: Trade offs between bureaucratic rules, administrative discretion and procedural rights entailed by the previous Government's proposed reform of decision making and appeals in social security

	Bureaucratic rules	Administrative discretion	Procedural rights
Consultation Paper			
Soc. Sec (inc. IS)	very strong	very weak	weak <i>(previously quite strong)</i>
Social Fund	very strong	quite strong	weak <i>(unchanged)</i>

What is at risk?

One of the major virtues of the existing arrangements for decision making and appeals is that the system of independent adjudication provides a measure of protection for those who are dependent on social security comparable to that provided by lawyers and the courts for private forms of property (Reich 1964, 1965). This is not to suggest that everything in the garden is rosy - far from it - or that there is no scope for improvements which would enhance the justice inherent in the administration of social security. However, instead of enhancing procedural fairness, the Government's proposals are virtually certain to diminish it, and to do so quite significantly. Although the influence of administrative discretion has been 'squeezed out' of most social security benefits, it still exists in the Social Fund. But the influence of claimants' rights, will if the Bill is passed and the proposals are implemented, be weakened across the board.

Summary - changes in procedural fairness

Prior to the 1980 reforms, applicants for and recipients of social assistance were largely dependent on the discretion of officials and received little protection from appeal tribunals. However, as a result of these and other reforms, Supplementary Benefit was brought into line with other social security benefits and the rights of applicants and recipients greatly enhanced through the establishment of the office of

Chief Adjudication Officer to monitor the standards of initial decision making and the strengthening of appeal tribunals which resulted from the establishment of the Independent Tribunal Service. Some of these gains were subsequently lost in the 1986 reforms by the establishment of a discretionary Social Fund which discarded the model of independent adjudication in favour of a model of bureaucratic decision making in which, among other things, internal review has been emphasised at the expense of an appeal to an external tribunal. Similar developments in other areas of social security have likewise weakened the rights of claimants but are trivial in comparison to the proposals for 'improving' decision making and appeals which were put forward by the British Government. These proposals would have the effect of abolishing the system of independent adjudication and severely curtailing the degree of procedural protection which appeal tribunals would be able to provide. If the Bill is passed and the proposals are enacted, procedural fairness will be substantially diminished in much the same way as substantive justice has already been. Until recently, it could be argued that gains in procedural fairness had accompanied losses in substantive justice, i.e. that claimants had secured stronger rights albeit to lower levels of benefit. However, this limited gain is now under serious threat.

PART 4: THE IMPLICATIONS FOR CITIZENSHIP

The concept of citizenship

T H Marshall (1963) defines citizenship as 'a status which is bestowed on everyone who is a full member of a community' and refers to the rights (and duties) people have in common as citizens. Marshall argues that citizenship comprises *three clusters of rights*: civil rights, political rights and social rights.

- *Civil rights* refer to rights which are necessary for individual freedom (freedom of movement, freedom of assembly, freedom of speech and freedom of religion), the right to own property and conclude valid contracts, the right to work and the right to justice (*habeus corpus*, i.e. freedom from

arbitrary arrest, the assumption of innocence until proven guilty, and the right to a fair trial).

- *Political rights* comprise the right to participate in the exercise of political power both as a voter and as a candidate.
- *Social rights* embrace the right to 'a modicum of economic welfare and security and to live the life of a civilised person according to the standards of society'.

The reference above, in the elucidation of social rights, to 'the standards of society' makes it clear that the content of each of the three components of citizenship is, to a degree, *open textured*. Their meaning cannot be completely specified in advance and can only be determined in the light of changing circumstances.

According to Marshall, each of the three clusters of rights is associated with a different set of institutions. Thus, civil rights are intimately bound up with and, in theory, protected by the *courts*, political rights are linked to *parliament*, while, in the United Kingdom, social rights are associated with what came to be known, in a generic sense, as the *social services*, i.e. with the public provision of benefits and services and the regulation of those that are privately provided (Cranston 1985).

Inasmuch as citizenship refers to what people have in common as citizens, e.g. the right to make and enforce contracts, to vote and to receive treatment from the National Health Service, it is an egalitarian concept and can be contrasted with all those attributes and characteristics which are unequally distributed in society, e.g. intelligence, strength, health, income, wealth etc.

One consequence of citizenship is that it reduces the significance of economic and social inequalities. This applies to each of the clusters of rights which make up citizenship. In the absence of civil, political and social rights, the ability to make and enforce contracts, to vote and to obtain health care are all distributed unequally and determined by the pattern of economic and social inequalities in society. But, where men and women have civil, political and social rights, the right to make and enforce contracts, vote and obtain health care are available to everyone. Although economic

and social inequalities still exist, they are of less significance. It is in this sense that we can say that citizenship ameliorates social and economic inequalities. But, it is also the case that it can legitimate them - because they are of less significance, they may be seen as more acceptable.

However, although citizenship may be equal in form, it does not follow that it is equal in content. And that is why the weakening of procedural rights and substantive entitlements for those who are dependent on social security in the United Kingdom is of such great concern. Marshall defined social rights in terms of a level of economic welfare and security that enabled people 'to live the life of a civilised person according to the standards of society' but, for an increasing number of poor people in Britain, it is not clear that they can still do so.

Social democratic and 'new right' perspectives on social rights as a component of citizenship

Social democrats like Marshall and Plant (1993) argue that social rights are an essential component of citizenship. This is because, in the absence of rights to minimum levels of income, health care, education etc., people will be unable to participate fully in the life of society or to exercise their civil and political rights. On the other hand, classical liberals like Hayek (1982) and Barry (1990) argue that social rights are not really a component of citizenship at all. This is both because social rights are positive rights and, unlike civil and political rights, which are negative rights and embody absolute standards, positive rights reflect normative judgments and because social rights can only be achieved at the expense of other rights. Thus, it is argued that the 'right' to social security pre-supposes agreement on how much social security a person should receive and the existence of a social security system paid for out of taxation to ensure that they receive what they are entitled to. However, the level of social security payments necessarily reflects political judgments and the compulsory nature of taxation is, they argue, inconsistent with respect for property rights.

These robust arguments are not, in fact, as overwhelming as they may initially appear to be. This is because social rights cannot be distinguished from civil and political rights in this way. The extensiveness of civil and political rights are also matters of judgment and taxation is also required to finance the legal system and parliamentary institutions. Thus, the difference between social rights on the one hand and civil and political rights on the other is one of degree rather than one of kind.

In an important article, Ignatieff (1989) contrasts a rights-based citizenship of entitlement (based on Marshall's conception of citizenship) with a duty-based citizenship of empowerment (as championed during the 1980s and 1990s in the UK and the USA). The former is described as passive and was formerly championed by governments of the centre-left (mainly by Labour governments in Britain and by Democratic administrations in the USA) in order to counter and compensate for unacceptable inequalities generated by the market, while the latter is described as active and has been championed more recently by governments of the right (by a string of radical Conservative governments in Britain and Republican administrations in the USA) in order to deal with the 'despotism' and 'dreariness' of public provision and the state of dependency which it is said to have generated. While governments of the left argued that a generous structure of universal social entitlements was a precondition for the exercise of liberty in a capitalist society and that the economy actually required a citizenship of entitlement for its efficient functioning, governments of the right claimed that this approach destroyed the liberty it was intended to enhance and effectively throttled the market.

Like justice, citizenship appears to have all the characteristics of an essentially contested concept (Gallie op. cit.). The concept of citizenship can be defined relatively uncontroversially as 'a status which bestows equal rights and duties on those who are full members of a community' but this is interpreted in very different ways by those with competing conceptions of what rights and duties it should entail. Thus, a citizenship of entitlement and a citizenship of empowerment can be understood as two competing conceptions of citizenship - each of them rests on a different set of value assumptions but each of them is coherent, attractive and compelling in its own

way. However, according to Ignatieff, the active (duty-based) and the passive (rights-based) conceptions of citizenship are not wholly independent. On the contrary, they are quite closely bound up with one another. Moreover, the failure of politicians on the right as well as the left to realise this has created serious and, at the time when he wrote, unresolved problems.

The problem for governments of the centre (for 'New' Labour under Tony Blair in the UK as much as for the second Clinton Administration in the USA) is to recognise that, although entitlement needs to be seen for what it is, namely a means to an end, and not as an end in itself, empowerment requires a basic infrastructure of entitlement for its own realisation. If his argument is correct, it would seem to follow that empowerment and entitlement are two facets of citizenship (just as absolute and relative deprivation are two facets of poverty).

Social justice, citizenship and poverty in the UK

As demonstrated above, social justice has substantive and procedural components, both of which are in jeopardy. Benefit levels have been allowed to fall with a result that there has been a substantial increase in the extent of poverty and inequality in the United Kingdom and the present government, acting on proposals put forward by the previous government, is now proposing to reduce the degree of procedural protection provided for those who are dependent on social security and to reverse a series of reforms which, over the last 20-30 years, had considerably strengthened their procedural rights. Both these developments diminish the meaning and significance of citizenship for the poor. The reduction in the level of social security benefits has already reduced their social rights, had knock-on effects for civil and political rights and made it considerably harder for them to participate in the life of society as full citizens while the threatened reduction in the level of procedural protection afforded to them will reduce their civil rights still further and ensure that they are doubly disadvantaged.

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The five general features of the social security system which I set out in the volume, cannot tell for the first time how you feel. There have been eight decades of the said, without wanting to boast, I feel in the world that we have already published more excellent articles in the journal. However among them, and the one which, in my view is 'editorial address', it has given me the greatest pleasure to follow, was James Tully's seminal article entitled 'In Defence of Money or Material Principles Contracts' which was published in our fifth issue in the spring of 2001.

In his article, James Tully identifies five patterns of social security. Each of them is presented as an ideal type as follows:

- **Charity** – giving without expectation of receiving anything in return.
- **Respectability** – giving with the expectation of receiving something equivalent in return later on, although there is no single break during the exact equivalence.
- **Entitlement** – enjoyment of the social rights of citizenship, i.e. the right to an adequate level of income, decent working conditions, health care and education, etc. To the extent that the realization of these rights by citizens does involve the provision of benefits and services that have to be paid for by others, the social right of citizenship entitles one to demand that others should contribute to the cost of such provision in proportion to their own contribution. Under systems of redistribution, some people end up as net donors while others end up as net beneficiaries but, since, in theory, a person's contribution to the social system is proportional to the aggregate level, and the aggregate level is the same for all, the social right of citizenship entitles one to demand that others should contribute to the cost of such provision in proportion to their own contribution.

CHAPTER 10

‘MESSY CONTRACTS’ OR ‘TRADE-OFFS’ BETWEEN COMPETING PRINCIPLES?

The *European Journal of Social Security*, of which I am one of the editors, came out for the first time two years ago. There have been eight issues so far and, without wanting to boast, I am in no doubt that we have already published some excellent articles in the journal. Foremost among them, and the one which, in my role as ‘editorial midwife’, it has given me the greatest pleasure to ‘deliver’, was Zsuzsa Ferge’s seminal article entitled ‘In Defence of Messy or Multi-Principle Contracts’ which we published in our fifth issue in the spring of 2000.¹

In her article, Zsuzsa distinguishes between four patterns of access to resources. Each of them is presented as an ideal type² as follows:

- *Charity* – giving without expectation of receiving anything in return.
- *Reciprocity* – giving with the expectation of receiving something equivalent in return later on, although there is no metric for calculating the exact equivalence.
- *Citizenship* – enjoyment of the social rights of citizenship, i.e. the right to an adequate level of income, decent working conditions, health care and education, etc. To the extent that the realisation of these rights by those in need involves the provision of benefits and services that have to be paid for by others, the social rights of citizenship entail an element of *redistribution*. Under systems of redistribution, some people end up as net gainers while others end up as net losers but, although there is a metric for calculating how this should operate at the aggregate level, there is no metric for doing so at the individual level.

- *Exchange* – based on the *market* principle, in which the price mechanism ensures that there is an exact, albeit formal, equivalence between supply and demand, i.e. between what is bought and sold and what is paid for.

According to Zsuzsa, charity, reciprocity, citizenship or redistribution, and exchange are all examples of *contracts* in that they represent promises or agreements between actors at the societal level. The relationships between the giver and the receiver in each of the models are set out in Table 1 below.

Table 1: Relationship between the Giver and the Receiver in the four Models

Model	Relationship
charity	asymmetrical
reciprocity	formally and substantively symmetrical
redistribution	indeterminate
market	formally symmetrical but substantively asymmetrical

In the case of charity, the relationship between the giver and the receiver is one-sided or asymmetrical; in the case of reciprocity, it is formally and substantively symmetrical; in the case of redistribution, it is indeterminate in that it depends on the accountability of government and thus on the acceptability or legitimacy of the social partners; in the case of the market, due to the unequal bargaining positions of the parties, it is formally symmetrical but substantively asymmetrical.

Arguing that social protection encompasses both labour law and social law, Zsuzsa then turns her attention (briefly) to labour contracts and (more extensively) to social insurance. She argues that, as ‘pure’ labour contracts, i.e. contracts between employers and employees based on market principles, have become surrounded by protective legislation based on the principles of citizenship, they have been transformed into what she calls ‘messy’ contracts, i.e. contracts that are based on more than one principle.

Social insurance schemes likewise reflect ‘messy contracts’ – flat-rate and earnings-related benefits on the one hand, funded and pay-as-you-go modes of financing on the other, are based on different principles and it follows that those schemes which incorporate several of these different elements, as most social insurance schemes do, are based on a number of different principles.

For Zsuzsa, messy contracts, involving a plurality of principles, are always preferable to pure contracts based on a single principle. This is because they ‘offer the best feasible solutions for societal policy’ and ‘can serve complex social purposes combining broad coverage, adequacy, and the promotion of social integration’. In addition, it is because ‘they can incorporate opposed interests and can reconcile, at least to some extent, individualism with collective structure’.³ For this reason, she extols the virtues of social insurance in general, and public, earnings-related, pay-as-you-go schemes in particular and, by implication, asserts their superiority over other forms of social protection that are based on single principles, e.g. social assistance (based on charity), mutual aid (based on reciprocity) and private insurance (based on market principles).

One of the great strengths of Zsuzsa’s article is its acknowledgement that the principles underlying different forms of contract are not mutually incompatible but can be combined in complex social security schemes which serve a plurality of social purposes. Its weaknesses, if I may be so bold as to say so on an occasion like this, are that it oscillates between a focus on social insurance as a generic category and on a particular form of social insurance, i.e. on public, earnings-related, pay-as-you-go social insurance schemes; and that it analyses one type of social security scheme (social insurance) rather than the totality of the means of social protection that exists in a given country.

Reference to Gøsta Esping-Andersen’s *Three Worlds of Welfare Capitalism*⁴ will enable me to illustrate these criticisms. According to Esping-Andersen, de-commodification occurs when benefits or services are provided as a matter of right and when a person can maintain a livelihood without reliance on the market. De-commodifying welfare states

are relatively recent and welfare states differ in the extent to which they achieve de-commodification. Esping-Andersen then sets out to demonstrate that welfare states cluster into three groups or 'regime types', which he refers to as *liberal*, *corporatist* and *social democratic* welfare states. Each of these regime types is associated with a different pattern of historical development (which will not be referred to here) and with a distinctive set of institutional arrangements (which are set out below).

Liberal Welfare States

- Modest (flat rate) social insurance and means-tested social assistance predominate.
- Benefits cater to a clientele of low income, mainly working class dependents.
- The state encourages provision through the market, either passively (by guaranteeing a minimum) or actually (by subsidising private provision).
- Social reform is circumscribed by a strong work ethic.
- The resulting system of stratification comprises relative equality of poverty among largely working class welfare recipients, market differentiated welfare among the predominantly middle class majority, and 'class political dualism' between the two.
- De-commodification is minimal.

Corporatist Welfare States

- Separate (earnings-related) social insurance schemes for different occupational groups, e.g. for civil servants, salaried workers (middle classes) and waged workers (working classes) predominate. Thus, social security provision reflects class and status differentials.
- The market is displaced as a provider of welfare – private insurance and occupational provision are relatively unimportant.
- The Church exercises important influence – social security supports traditional family forms.
- The principle of 'subsidiarity' applies.
- The resulting system of stratification mirrors the system of stratification in society as a whole – class and status distinctions derived from the market are built into the social security system and redistribution is limited.
- De-commodification is limited.

Social Democratic Welfare States

- There are universal (earnings related) social insurance schemes for all
- Benefits and services reflect the highest aspirations of the (affluent) middle classes but the working classes have same rights as the middle classes.
- State provision crowds out the market.
- Social security is linked with the guarantee of full employment. In addition, social security attempts to socialise the costs of motherhood.
- The stratification associated with welfare effectively confronts and challenges the system of stratification derived from the market.
- De-commodification is extensive.

Esping-Andersen's approach raises a number of problems that I do not wish to dwell on here.⁵ The points I do want to make and my reasons for citing his approach at some length are that it recognises the wide variety of social security schemes and that it considers the totality of the means of social protection, and thus the mix between different social security schemes (which, as Zsuzsa pointed out in her article, are based on different principles) that is to be found in a given country.

At this point, I should like to make a connection between Zsuzsa's concerns in her paper and my own concerns in my recent work. Whereas Zsuzsa's main concern is with the *ends* of social protection, i.e. with what social protection schemes should aim to achieve, my main concern has been with the *means* by which social protection is delivered, i.e. with how social protection schemes should be run. My own work has been strongly influenced by that of the American public lawyer, Jerry Mashaw, and, in particular, by his pioneering study of the American Disability Insurance (DI) scheme.⁶

In considering the DI scheme, Mashaw detected three broad strands of criticism leveled against it: the first indicted it for lacking adequate management controls and for producing inconsistent decisions; the second for not providing a good service and for failing to rehabilitate those who were dependent on it; and the third for not paying enough attention to 'due process' and for failing to respect and uphold the rights of those

dependent on it.⁷ He argued that each strand of criticism reflected a different normative conception of the DI scheme, i.e. a different model of how the scheme could and should be run. The three models were characterised in terms of *bureaucratic rationality*, *professional treatment* and *moral judgment*, i.e. in terms of *bureaucratic*, *professional* and *legal* models of organisational decision making.

Like Zsuzsa’s characterisation of patterns of access, these normative models are also ideal types⁸. As such, they can be described in terms of their salient features and, drawing on Mashaw’s work, I have identified four such features: the characteristic mode of decision making, the legitimating goal of decision making, the mode of accountability and the nature of the remedy available to those who are dissatisfied. It should be noted that each of the models places the applicant or beneficiary in a different role.

The characteristics of the three models are set out in Table 2 below:

Table 2: Three Normative Models of Administrative Justice (based on Mashaw)

Model	Mode of Decision Making	Legitimating Goal	Mode of Accountability	Characteristic Remedy
bureaucracy	applying rules	accuracy	hierarchical	administrative review
professionalism	applying knowledge	public service	interpersonal	second opinion or complaint to a professional body
legality	weighing-up arguments	rule of law	independent	appeal to a court or tribunal

In the *bureaucratic* model, the role of the applicant is largely passive. An application is usually submitted on a standardised application form and assessed without any further involvement by the applicant. Officials apply carefully formulated rules to the information provided on the application form. The legitimating goal of the organisation is to make accurate (and consistent) decisions by applying the administrative rules.

Accountability is hierarchical, and officials are accountable to their superiors. Those who are dissatisfied can appeal against the decision and these appeals are dealt by means of an (internal) administrative review of the original decision.

In organisations characterised by a *professional* model, professionally trained staff make administrative decisions by applying their knowledge and expertise to the specific circumstances of the applicant's case. Accordingly, applicants may play a more interactive role in their dealings with the organisation, although they are still subordinate to the professional experts. The legitimating goal of the organisation is to promote the interests or well-being of the applicant or beneficiary. Accountability is interpersonal and staff are accountable to their professional peers. Those who are dissatisfied can ask for a second opinion or complain to the relevant professional body or association.

In the *legal* model of organisation, applicants (or their representatives) take a more active role in asserting their rights and arguing the merits of their case. Decisions are made by independent decision-makers who weigh up the arguments of the parties. The legitimating goal of the organisation is fairness, and accountability is to an independent adjudicator located outwith the organisation. Those who are unhappy with the decision in their case may appeal to a court or tribunal.

Table 2 refers to the models as models of administrative justice and this calls for some explanation. In the discussion above, I have referred to normative models of decision making and it is clear that each of the models refers to a different way of making and challenging decisions. However, the fact that the models are ideal types rather than empirical generalisations means that the various components of the model function as standards for assessing the decisions that are actually taken. As such, they not only describe how decisions should be made and may be challenged but also how individuals should be treated. It is in this sense that they constitute models of procedural justice.⁹

In the post-war period, many (perhaps most) public welfare services were shaped by the three models outlined above although their importance varied from one policy domain and one country to another. However, by the mid-1980s, welfare organisations had come under attack in many countries.¹⁰ As a result, the bureaucratic, professional and legal models have, in many countries, been challenged by other models of decision making, in particular by a managerial model associated with the rise of new public management,¹¹ by a consumerist model which focuses on the increased participation of consumers in decision making,¹² and a market model which emphasises competition and choice.¹³ Three additional models can be added to the three models outlined above. The characteristics of the six models are set out in Table 3 below.

Six Normative Models of Procedural Justice

Model	Mode of Decision Making	Legitimizing Goal	Mode of Accountability	Characteristic Remedy for User
bureaucracy	applying rules	accuracy and consistency	hierarchical	administrative review
professionalism	applying knowledge	public service	interpersonal (through peer review)	second opinion or complaint to a professional body
legality	weighing-up arguments	rule of law	independent	appeal to a court or tribunal (public law)
managerialism	managerial autonomy	efficiency	performance indicators	complaint to management (or regulatory body)
consumerism	active participation	consumer satisfaction	Consumer Charters	'voice' and/or compensation through Charter
markets	matching supply and demand	profit making	to owners or shareholders	'exit' and/or court action (private law)

In the *managerial* model, which emerged in the 1980s and 1990s, beneficiaries (or users) do not play an important role. The legitimating goal of this model is efficiency

and is premised on managerial autonomy, i.e. on allowing managers the freedom to manage. Accountability is achieved through the use of performance indicators. The only recourse available to those who are dissatisfied is to complain to management or a regulatory body that can then impose sanctions for not meeting performance requirements.

In contrast to the absence of the beneficiary or user in the managerial model, in the *consumerist* model, which also emerged during the 1980s and 1990s, the user is at the centre of the organisation. Here the aim is to ensure consumer satisfaction. In reaching decisions, there is active engagement or consultation with the user. Customer charters define consumer rights, levels of service to be expected and grievance processes. Remedies for grievances are the right to be heard, with the effect that ensuring that action is taken to remedy the problem and that compensation is granted according to the organisation's customer charter.

Finally, in the *market* model, decision making involves the matching of supply and demand and is made with reference to the price mechanism. The legitimating goal is profit making, while the prevailing mode of accountability is to the owners or shareholders. In contrast to consumerism, where the individual can use 'voice' as a remedy and can obtain compensation through the consumer charters if the specified standards have not been met, markets provide the possibility of 'exit'.¹⁴ In addition, an aggrieved individual may seek compensation for breach of contract where he or she suffers some measurable loss from the action or inaction of the administration. Internal or quasi-markets¹⁵ have some but not all of the characteristics of the market model just outlined..

Following Mashaw, I contend that these models are *competitive*, rather than *mutually exclusive*.¹⁶ It follows that, although they are not all necessarily in evidence in any particular context, they can and do coexist with each other in public welfare organisations and, thus, in social security institutions. Just as social security institutions

reflect ‘messy contracts’ at one level, so they reflect trade-offs between competing models of administrative justice at another level. And, just as messy contracts, involving a plurality of principles, are preferable to pure contracts based on a single principle, so a composite model of administrative justice, which combines appropriate features of particular models, can have many advantages over any single model.

The approach I have outlined enables us to see both what ‘trade-offs’ are made between them in particular cases and what different, and possibly more desirable, trade-offs might be made. It is a *pluralistic* approach that recognises a plurality of normative positions, making any given trade-off attractive for some people and unattractive for others.

The actual and potential trade-offs I have referred to reflect the concerns and the bargaining strengths and bargaining strategies of the institutional actors who have an interest in promoting the different models. These are summarised in Table 4.

Table 4: Institutional Actors associated with different Models of Decision-Making

Model	Institutional Actors
Bureaucratic	civil servants and officials
Professional	professionals and ‘street level bureaucrats’
Legal	lawyers, court and tribunal personnel
Managerial	managers
Consumerist	consumers
Market	‘rational economic actors’ and private, profit-making organisations

They are typically civil servants and officials in case of the bureaucratic model; professionals and ‘street level bureaucrats’¹⁷ in the case of the professional model; lawyers, court and tribunal personnel and groups representing clients in the case of the legal model; managers in the case of the managerial model; consumers in the

consumerist model; and 'rational economic actors' and private, profit-making organisations in the case of the market model. Trade-offs vary between different organisations in the same country, between the same (or similar) organisations in different countries. They also vary within a given organisation, between the different policies delivered by that organisation and between the different stages of policy implementation. But, other things being equal, the more evidence there is of one model, the less will there be of the others.¹⁸

In some ongoing research, Paul Henman and I set out to describe the trade-offs between the six normative models of administrative justice which have been achieved in organisations responsible for the delivery of social security in 14 countries, and to examine the impact of information technology on these trade offs.¹⁹ Data were generated by means of a structured questionnaire which was completed by two expert informants in each country, one of whom was, wherever possible, an 'insider' working for the government or a social security institution while the other was an 'outsider', usually an independent researcher or consultant. In nearly every case, the expert informants responded by e-mail, enabling us to seek clarification where the two informants from a given country gave different answers to the same question or where their responses were incomplete or internally inconsistent.

I have only time to give a very brief summary of our findings. With two exceptions, it is clear that *bureaucracy* is still the dominant model of procedural justice in social security in the ten countries for which data was available at the time,²⁰ and computerisation appears to have reinforced this dominance. Computerisation also appears to have had a very significant effect in promoting *the managerial model*, which in many countries is now second in importance. In contrast to this, *professionalism* is little in evidence and there appears to have been a tendency for computerisation to reduce its importance. There is also little evidence that *the market model* has had much of an impact. The two exceptions here are Belgium and Finland – in the former, employers and employees can choose which social security fund delivers social security benefits. Despite its rather

low profile, *the market model* appears to have been somewhat strengthened by computerisation. While the importance of *the legal model* of procedural justice appears to be stronger in some respects than in others, computerisation appears to have had a minimal effect on it. Finally, the importance of *consumerism* differs from country to country and computerisation has had been a mixed response on it.

I offer this account of some of my recent work to you Zsuzsa as an example of another pluralistic approach to social security which recognises that institutions that reflect a number of competing principles are preferable to those that are based on a single principle. However, just as I have ventured a few criticisms of your work, so, I am sure, you will be critical of mine. You may think that my concern with procedural fairness, with how people are treated, is less important than a concern with substantive justice, with what people contribute and receive, and you may well be right. You may criticise me for, at least implicitly, accepting John Rawls' claim that 'justice is the first virtue of social institutions'²¹, on the grounds that the sociological issues you tackle in your paper, in particular your concerns with the relations between those who give and those who receive, and with the problem of social integration, are of even greater importance. You may likewise be somewhat impatient with the relativity of my approach, with my claim that the trade-offs between different normative models which are made, and likewise those which could be made, reflect the bargaining strengths and bargaining strategies of the institutional actors who have an interest in promoting them, and my observation that trade-offs which are attractive for some people will be unattractive for others, and you may urge me to be more engaged and less even-handed in my approach.

It is a great honour to be here and an even greater honour to have been invited to speak today. As usual, I await your comments on my contribution with some trepidation.

NOTES AND REFERENCES

1. Ferge, Z. (2000) 'In Defence of Messy or Multi-Principle Contracts', *European Journal of Social Security*, 2 (1), pp. 7-33.
2. See Weber, M (1949) *On the Methodology of the Social Sciences*, Free Press, Glencoe, IL, pp 90-93.
3. Ferge, Z. (2000), *op. cit.*, pp. 24-25.
4. Esping-Andersen, G. (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press, chapters 1 and 2.
5. Some of these are conceptual, for example, it is not self-evident that the extent of de-commodification is a good measure of the 'content' of the welfare state. Feminists, like Jane Lewis, have argued that a better measure would be the extent to which the state has freed women from their traditional dependence on men. Other problems are methodological, for example, since de-commodification scores represent a continuous distribution with no very clear discontinuities, it is not clear that welfare states can be divided into three 'regime types' on the basis of their de-commodification scores. In any case, how should the Southern European (Mediterranean) welfare states or the welfare states associated with the 'Pacific Rim' or the formerly communist states of central and Eastern Europe be classified? In addition, it is not clear whether Esping-Andersen's focus on social security, e.g. at the expense of health care, affects his typology. Although the British social security system has many of the characteristics associated with 'liberal' model of welfare state provision, we do have a highly de-commodified system of health care which embodies many of the features of the 'social democratic' model. If that had been taken into account, it might have led to a different characterisation of the British welfare state. See Lewis, J. (1993) *Women and Social Policies in Western Europe*, Aldershot: Edward Elgar.
6. Mashaw, J. L. (1983) *Bureaucratic Justice*, New Haven, CT and London: Yale University Press.
7. *Ibid*, pp. 21-22
8. See Weber, M. (1949), *op. cit.*
9. My use of the terms 'procedural justice' and 'procedural fairness' corresponds to Mashaw's use of the term 'administrative justice', which he defines in terms of 'those qualities of a decision process that provide arguments for the acceptability of its decisions'. See Mashaw, *op. cit.*, p 24.
10. They were variously criticised for lacking neutrality and being biased against certain groups, for their failure to contain the growing demands for cost containment, for having a vested interest in the maintenance and expansion of existing 'empires', for not promoting the 'public interest'; and, as 'monopoly providers' for being insulated from competition which would force them to become more efficient and more responsive to the demands and preferences of

consumers.

11. Hood, C. (1991) 'A New Public Management for All Seasons', *Public Administration*, 69, Spring, pp. 3-19; and Hood, C. (1998) *The Art of the State: Culture, Rhetoric and Public Management*, Oxford: Clarendon Press.
12. Clarke, J. and Newman, J. (1997) *The Managerial State*, London, Thousand Oaks and New Delhi, Sage.
13. Johnson, N. (ed.) (1995) *Private Markets in Health and Welfare: an International Perspective*, Oxford and Providence, RI: Berg.
14. Hirschman, A. O. (1970) *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States*, Cambridge, MA: Harvard University Press.
15. See Le Grand, J. (1991) 'Quasi Markets in Social Policy', *Economic Journal*, 101, September, pp. 1256-1267, and Le Grand, J. and Bartlett, W. (eds.) *Quasi Markets and Social Policy*, Basingstoke: Macmillan.
16. See Mashaw, *op. cit.*, p. 23
17. Lipsky, M. (1980) *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York, NY: Russell Sage Foundation.
18. It should be noted that, by focusing on the *relative strengths* of competing models, Mashaw ignored their *absolute strengths*. Examples of decision making in which the relative strengths of the six models are given weights of 6, 5, 4, 3, 2 and 1 units and 60, 50, 40, 30, 20 and 10 units would clearly have very different characteristics. 'Thick' balances are clearly very different from 'thin' ones.
19. Adler, M. and Henman, P. (2001), 'e-Justice: a Comparative Study of Computerisation and Procedural Justice in Social Security', *International Review of Law, Computers and Technology*, 15(2), pp. 195-212.
20. Australia, Belgium, Canada, Denmark, Finland, France, Ireland, the Netherlands, Norway, the United Kingdom. Three additional countries (Germany, Sweden and the USA) have since been added.
21. Rawls, J. (1972) *A Theory of Justice*, Oxford: Clarendon Press, p. 3. The full quotation is 'justice is the first virtue of social institutions, just as truth is to systems of thought'.